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In The

Supreme Court of the United States

October Term, 1987

E.K. WILCOX, JR.,

Petitioner,

v.

J. PAUL FORD, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The lower courts are confused and in conflict concerning the standards that govern due process challenges to the admission of coerced statements and testimony of non-defendants. Some courts hold that admission is error whenever the statement or testimony was involuntary; others find error where there are indications that the evidence was unreliable; and still others, like the court below, find error only when the defendant failed to receive a "fundamentally fair" trial.

The questions presented are:

1. Whether the court of appeals applied an erroneous standard in holding that admission of a statement by one of the State's two principal witnesses, and the testimony of the other, did not violate Petitioner's due process right to a fair trial even though the statement and testimony resulted from coercive police interrogations of those witnesses.

2. Whether the court of appeals erred in concluding, contrary to other federal and state courts, that cross-examination and general jury instructions are adequate remedies for the admission of the coerced statement or testimony of a non-defendant.

The court of appeals, in reversing the district court's grant of habeas relief, also held that the police misconduct in this case did not violate the due process principles set forth in *Rochin v. California* (342 U.S. 165 (1952)) and *United States v. Russell* (411 U.S. 423 (1973)), and that there was sufficient evidence to support Petitioner's convictions.

The questions presented are:

3. Did the court of appeals err in suggesting, contrary to numerous federal decisions, that due process is implicated by police misconduct only in entrapment situations, and in holding that the police misconduct in this case did

not shock the conscience?

4. Whether a conviction is supported by sufficient evidence under *Jackson v. Virginia* (443 U.S. 307 (1979)) where the only evidence supporting the conviction consists of the testimony of one witness, and where that testimony is physically impossible, self-contradictory, and tainted by the coercive police interrogations which procured it.

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E.K. WILCOX, JR.,

Petitioner,

v.

J. PAUL FORD, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, E.K. Wilcox Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Wilcox v. Ford*, 813 F.2d 1140 (CA11 1987) and appears at p. 2a of the appendix ("App.").

The district court's opinion is reported at *Wilcox v. Ford*, 626 F. Supp. 760 (M.D. Ga. 1985), and is reprinted at App. 37a.

JURISDICTION

The Court of Appeals for the Eleventh Circuit filed its opinion on April 3, 1987 (App. 2a) and denied rehearing and rehearing *en banc* on May 11, 1987 (App. 34a). This Petition is filed within ninety (90) days of the denial of rehearing. The jurisdiction of this Court is predicated on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are set forth at App. 1a.

STATEMENT OF THE CASE

In August of 1972, the Petitioner and his father owned and operated Wilcox Outdoor Advertising, a billboard advertising company located in Valdosta, Georgia. Hellen Hanks was an employee of the business, as were Ed Wrentz, Lorenzo Marshall, and John Goodman.

On August 31, 1972, a Thursday, Hanks disappeared. Investigations of her disappearance by the Valdosta Police Department and the Georgia Bureau of Investigation proved unavailing, and eventually were discontinued. More than eight years after Hanks's disappearance, on November 24, 1980, her body was found in a box that was buried in a field in Valdosta. Several items found at the burial site belonged to Wilcox Outdoor Advertising.

The investigation into Hanks's death by local authorities proved fruitless for approximately three months. During that period, the investigating officers interviewed Wrentz, Marshall, and Goodman at least once each. In 1972, those three gentlemen had been employed as minimum-wage laborers whose duties were to construct billboards and post signs. All three, who by 1980 were no longer employed by Wilcox Outdoor Advertising, stated that they knew nothing about Hanks's disappearance.

Specifically, Wrentz and Marshall informed the officers that they had been out of town on work assignments when she disappeared.[1] 626 F. Supp. at 775, 781 (App. 68a, 83a); *see* Record, Exh. D at 1, 4-5.

The investigating officers then engaged in a number of unrelenting, abusive interrogations of Wrentz, Marshall, and Goodman. The purpose of these additional interrogations, as the district court found, was to coerce testimony from these individuals that would implicate the Petitioner in Hanks's murder. *See* 626 F. Supp. at 778 (App. 75a).

The terroristic nature of the police interrogations can be appreciated only by reviewing the transcripts. Lengthy descriptions of the interrogations and excerpts from the transcripts appear in the district court's opinion, *id.* at 771-85 (App. 60a-88a); the complete transcripts are in the Record. To convey the flavor of the interrogations, however, we describe below the July 1-2, 1981 questioning of Wrentz and Marshall.[2]

Coercing testimony from Wrentz was not a formidable task. He was an elderly, illiterate black man who, according to testimony by the interrogating police officers at the district court's evidentiary hearing, suffered from the "old slave syndrome" and would "agree to anything a white man asked him in a leading question format." 813 F.2d at 1147 (App. 17a). Wrentz was questioned on July 1, 1981, in a

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[1] Employees of Wilcox Outdoor Advertising frequently would spend several days and nights away from Valdosta on business.

[2] Goodman, a younger man than Wrentz and Marshall, was subjected to similar abuse. The interrogators said they planned to hold him indefinitely, and repeatedly threatened to "fry his ass." 813 F.2d at 1147 (App. 17a). Goodman withstood this barbarism, however, and maintained his assertion that he knew nothing about Hanks's disappearance or murder. Because the police had no information to the contrary – notwithstanding the claims they made during the interrogations – Goodman was never called as a witness at the trial.

small, isolated room at the Valdosta police station. This was at least the fourth time the police had interviewed Wrentz since the discovery of Hanks's body. On this occasion, like the others, no one was present except Wrentz and the police officers, all of whom were white.

Wrentz initially told the investigators on this occasion that he had absolutely no knowledge about Hanks's disappearance. *See* 626 F. Supp. at 776 (App. 71a). This was consistent with numerous prior statements by Wrentz that he was away on a work assignment when Hanks disappeared. *See* Record, Exh. D at 1, 4-5; Exh. G at 2, 5.

The officers then began their "relentless, intimidating interrogation techniques." 626 F. Supp. at 779 (App. 78a). They threatened Wrentz by suggesting that unless he implicated the Petitioner, he would be killed ("Would you like somebody to come along and just snuff out your life?"), eternally damned ("God's going to strike you dead"; "[you're] going to go to hell for lying"), jailed indefinitely ("I'm about that close to putting you ass in jail now, and you can rot there for all I care"; "And if it takes your life to find out who killed her, fine, you can spend the rest of it in prison"), and even lynched ("Are you scared of somebody coming down here and getting you and taking you out and stringing you up somewhere, are you scared of that?"). *Id.* at 779-80 (App. 78a-82a); *see* 813 F.2d at 1147 (App. 17a). After hours of this treatment, and clear indications from the officers of what they wanted him to say, Wrentz stated that he and Marshall had helped the Petitioner bury Hanks's body on August 31, 1972. Wrentz then signed a statement to this effect.

Marshall was a black man in his late sixties with a fourth-grade education. On July 2, 1981, he was interrogated in an isolated room at the police station. This was at least the second interview of Marshall since the discovery of Hanks's body. The questioning on this occasion lasted for approximately nine and one-half hours, through-

out which Marshall was deprived of food and water. 626 F. Supp. at 782 (App. 86a); *see* 813 F.2d at 1147 (App. 18a). At the outset, Marshall said he had no information about Hanks's disappearance, since he was away from Valdosta on a work assignment from Tuesday through Friday of the week Hanks disappeared. This was consistent with all of Marshall's prior statements to the police.

The inquisitors then "threatened to send [Marshall] to the electric chair along with two other Wilcox employees and also told him that he would die in prison," *id.* at 1147 (App. 18a), if he did not implicate the Petitioner. After many hours of similar "intimidating, coercive" questioning, 626 F. Supp. at 781 (App. 83a), the police brought Wrentz into the interrogation room and had him repeat the story implicating the Petitioner and Marshall. Finally, after more "lengthy coercive questioning," *id.* at 782 (App. 85a), Marshall succumbed to the officers' tactics and signed a statement admitting that he and Wrentz had helped Petitioner bury a box shortly after Hanks's disappearance.

In January 1982, Petitioner was tried in the Superior Court for Lowndes County, Georgia on charges of murdering Hanks (O.C.G.A. §16-5-1(a)) and concealing her death (*id.* §16-10-31). The State called Marshall as a witness, but he denied having participated in Hanks's burial. Marshall testified that he lacked any knowledge about Hanks's disappearance because he was out of town on business, along with two other Wilcox Outdoor Advertising employees, when Hanks disappeared. *See* 626 F. Supp. at 766 (App. 48a). These employees – Ellis Roundtree and Ed Smith – corroborated Marshall's testimony later in the trial. They testified that they were in Albany, Georgia with Marshall on a work assignment during the week of Hanks's disappearance. *Ibid.*

The State impeached Marshall by introducing his written statement of July 2, 1981. Marshall acknowledged having signed the statement but maintained that the state-

ment was not true, that he had signed it only because he was scared and wanted to go home, and that he had told the police officers from the beginning that he knew nothing about a burial. *Ibid.* Facts concerning the coercion that attended Marshall's statement were brought out on cross-examination.

Wrentz also testified for the State. On direct, he testified that on August 31, 1972, he, the Petitioner, Petitioner's father, and Marshall dug a hole and buried a box containing Hanks's body in a field in Valdosta. *Ibid.* (App. 49a). On cross-examination, Wrentz flatly repudiated this story. He testified, instead, that he knew nothing about Hanks's disappearance or burial because he had been on a work assignment in Florida from August 31 through September 2, 1972. *Ibid.* No doubt seeking to be cooperative with the prosecutor, on redirect Wrentz repeated the version of events implicating Petitioner in the burial. Wrentz's July 1 statement was not introduced or commented upon during his testimony, but aspects of his police interrogations were discussed on cross-examination.

Neither the testimony of Wrentz or Marshall, nor any other evidence at the trial, directly implicated Petitioner in Hanks's murder. Rather, the State attempted to show through medical testimony and other circumstantial evidence that Hanks might have been strangled in connection with a sexual assault, and that Petitioner had both motive and opportunity to commit this crime. Petitioner and his father testified, however, that they were in Atlanta on business from August 29 until the afternoon of August 31.[3] They also asserted that Hanks was not in the office when they returned there on August 31.

The jury convicted Petitioner on both counts. Peti-

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[3] This was not disputed, although the State challenged the testimony of Petitioner and his father concerning the time of their return to Valdosta on the 31st.

tioner was sentenced to life imprisonment for murder and to a consecutive twelve-month sentence for concealing the death. On direct appeal, the Supreme Court of Georgia affirmed these convictions. The court expressly rejected Petitioner's constitutional claim that the investigating officers' misconduct, and the introduction of the resulting involuntary statement and testimony, had deprived him of a fair trial.[4] It also found that the evidence was sufficient to support his convictions under *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251, 257-60 (1983) (App. 108a-14a). After exhausting his collateral state remedies, *see* 626 F. Supp. at 761-62 (App. 40a); 813 F.2d at 1142 (App. 7a), Petitioner filed the instant petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254(a), in the United States District Court for the Middle District of Georgia.

Chief Judge Wilbur D. Owens granted the petition on several alternative bases. He found that the coercive, abusive interrogations, which had produced the only evidence supporting Petitioner's convictions, constituted police misconduct that "shocked the conscience," thereby violating due process and entitling Petitioner to a new trial. 626 F. Supp. at 783-85 (App. 89a-91a) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952); and *United States v. Russell*, 411 U.S. 423, 431-32 (1973)).

The district court also concluded that there was insuffi-

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[4] The Georgia Supreme Court agreed, based on the excerpts from the interrogations which Petitioner's counsel had read into the record, that the police had acted improperly. The court did not review the complete transcripts or tapes of the interrogations, however, and conceded that "it is difficult to judge the extent" of the police misconduct "from the limited excerpts available." *Wilcox v. State*, 250 Ga. 745, 755, 301 S.E.2d 251, 259 (1983) (App. 112a-13a). The district court was "confident that, had the Georgia Court also had a complete record before it, it would also have determined that the police misconduct in this case 'shocks the conscience.'" 626 F. Supp. at 784 (App. 89a).

cient evidence to support Petitioner's convictions under *Jackson v. Virginia*. The court noted that the only evidence linking Petitioner to the crime was Wrentz's trial testimony.[5] The convictions accordingly could stand only if a rational factfinder could find that Wrentz's testimony demonstrated Petitioner's guilt beyond a reasonable doubt. Because that testimony was internally inconsistent, often incoherent, and – since Wrentz claimed he was in two different cities in two different states at the exact same time – physically impossible, the court held it did not meet the *Jackson* standard. The court said: "*it insults rational thought to attribute to Mr. Wrentz's testimony the degree of credibility necessary to justify a conviction for murder and life imprisonment.*" 626 F. Supp. at 771 (App. 59a) (emphasis in original).

Respondent appealed to the Court of Appeals for the Eleventh Circuit, which reversed the district court's decision. In discussing the coercive interrogations, the court of appeals first suggested that police misconduct can constitute a due process violation only in cases involving "sting or reverse sting operation[s]." 813 F.2d at 1148 (App. 19a). The court then held that regardless of whether a due process remedy would be available in some non-entrapment settings, the police misconduct in this case did not violate its sense of fundamental fairness or shock its conscience. *Ibid.* (App. 20a).

The court of appeals next rejected Petitioner's contention that the admission of Wrentz's coerced testimony and Marshall's coerced pretrial confession violated his due

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[5] Since Marshall's out-of-court statement was admitted only for impeachment purposes, Wrentz's testimony "provided the sole direct link between petitioner and Ms. Hanks' disappearance." 626 F. Supp. at 771 (App. 58a). During oral argument before the Eleventh Circuit, Respondent conceded that the convictions could not stand without Wrentz's testimony. *See* 813 F.2d at 1146, n.8 (App. 14a).

process rights. The standard of review the court applied was whether admission of the evidence had resulted in a fundamentally unfair trial. *Id.* at 1148-49 (App. 21a). The court reasoned that it had not, even though the reliability of the evidence might be suspect, because (1) Petitioner had the opportunity to rebut the evidence by cross-examining the witnesses and by introducing contrary evidence, and (2) the general jury charges on credibility of witnesses and reasonable doubt "gave the jury adequate opportunity to assess the proper weight to be accorded to the challenged evidence." *Ibid.* (App. 21a-23a).

The court also held there was sufficient evidence to support Petitioner's convictions. It agreed that testimony which is inherently incredible or physically impossible does not satisfy the rationality component of *Jackson v. Virginia* (citing *United States v. Chancey*, 715 F.2d 543, 546-47 (CA11 1983)). But Wrentz's testimony was not of this nature, the court held, because the account he gave on *direct examination* was credible. 813 F.2d at 1146 (App. 15a-16a). The court did not consider Wrentz's testimony on cross-examination, or the credibility of his testimony as a whole.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD IN HOLDING THAT ADMISSION OF A STATEMENT BY ONE OF THE STATE'S TWO PRINCIPAL WITNESSES, AND THE TESTIMONY OF THE OTHER, DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL EVEN THOUGH THE STATEMENT AND TESTIMONY RESULTED FROM COERCIVE POLICE INTERROGATIONS OF THOSE WITNESSES. UNDER THE STANDARDS APPLIED BY OTHER COURTS, WHICH FOCUS ON THE VOLUNTARINESS AND RELIABILITY OF THE WITNESS'S EVIDENCE, PETITIONER WOULD BE ENTITLED TO A NEW TRIAL.

No decision of this Court has squarely addressed whether, and under what circumstances, the admission of a witness's coerced testimony or statement violates a defendant's due process right to a fair trial. On at least three occasions, individual Justices have written that such a challenge should be upheld under certain circumstances; in each case, however, the Court chose not to address the question.[6] This case provides the Court with an excellent opportunity to fill this significant lacuna in its jurisprudence.

In the first such case, *Hysler v. Florida*, 315 U.S. 411 (1942), the petitioner contended that the testimony of two government witnesses had been coerced. The Court intimated that coercion of a witness would violate a defendant's due process rights, but found that the coercion claim was factually unsupported. *Id.* at 421-22. Justice Black's dissenting opinion disagreed with the Court's factual conclusion, and asserted that coercing a government witness to supply testimony taints the defendant's conviction "with a measure of brutality which [is] sufficient, without more, to establish a violation of constitutional rights." *Id.* at 424.

In *Malinski v. New York*, 324 U.S. 401 (1945), the petitioner argued that the introduction of a codefendant's coerced confession, during a joint trial, had deprived him of due process. The Court avoided the issue by finding that the redacted confession had been used only against

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[6] In addition to the cases discussed in the text below, the issue arose but was not decided in *Turner v. Pennsylvania*, 338 U.S. 62 (1949). In that case, the Court reversed the petitioner's murder conviction because of the admission of his own coerced confession. The Court noted that a co-defendant's confession also might have been coerced, and that the question might arise on remand whether this statement could be used against petitioner. The Court determined, however, that the witness coercion issue not only was factually unclear, but also was purely hypothetical because the evidence might not be used against petitioner at the retrial. *Id.* at 65-66.

the codefendant, and had not prejudiced the petitioner. *Id.* at 411-13. Because Justice Rutledge disagreed with this analysis, he was forced to confront whether the Due Process Clause forbids the use of a non-defendant's coerced confession. He readily concluded that it does:

> Due process does not permit one to be convicted upon his coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal.

Id. at 431 (dissenting opinion) (footnote and citations omitted).

In the third case, *Bradford v. Michigan*, 394 U.S. 1022 (1969), Chief Justice Warren was joined by Justices Douglas and Marshall in dissenting from the Court's denial of certiorari. In *Bradford*, the petitioner's purported accomplice was physically tortured until he gave a confession which implicated petitioner in a murder. The alleged accomplice testified to the same effect at trial, and petitioner contended that the admission of this testimony deprived him of a fair trial. The Chief Justice's opinion agreed that petitioner's due process rights had been violated, finding the rationale for excluding a defendant's coerced confession to be equally applicable to a witness's coerced statement or testimony. *Id.* at 1023. With respect to the State's argument that the coerced pretrial confession had not been introduced at trial, the opinion noted that the in-court testimony "was cut from the same fabric that produced his original statement." *Id.* at 1024. On subsequent federal habeas review, the petitioner's conviction was overturned. *See Bradford v. Johnson*, 466 F.2d 60 (CA6 1973) (per curiam), *aff'g* 354 F. Supp. 1331 (E.D. Mich. 1972).

Although the opinions discussed above have provided some guidance to lower federal and state courts, substantial conflict has developed among those courts concerning the standards that govern due process challenges to the

admission of coerced witness testimony. Several courts have ruled – appropriately, in Petitioner's view – that the *voluntariness* of the non-defendant's testimony or pretrial statement governs its admissibility. This is the same standard that determines whether a defendant's own confession may be used against him. *See Jackson v. Denno*, 378 U.S. 368, 379-91 (1964). The cases employing this standard include *LaFrance v. Bohlinger*, 499 F.2d 29, 32-36 (CA1 1974) (holding that the trial judge should conduct a *Jackson v. Denno* hearing on voluntariness before allowing allegedly coerced evidence to be presented to the jury); *People v. Underwood*, 37 Cal. Rptr. 313, 389 P.2d 937, 943 (1964) ("The same policy considerations which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary statement given as the result of pressures exerted by the police"); and *People v. Newman*, 30 Ill.2d 419, 197 N.E.2d 12, 14 (1964) ("The voluntary character of [a non-defendant's] extrajudicial statement must be established before it may be used even for impeachment purposes").

Other courts have suggested that the admission of coerced witness testimony violates due process only when it results in a fundamentally unfair trial. Those courts have indicated that involuntariness, without more, is an insufficient basis for finding that use of the evidence violates due process. The court below, for example, held that even if Wrentz's testimony and Marshall's pretrial statement were procured by government coercion, and even if the reliability of this evidence was suspect, Petitioner somehow had on the whole received "a fundamentally fair trial." 813 F.2d at 1149 (App. 23a). Similarly, in *United States v. Merkt*, 764 F.2d 266, 274 (CA5 1985), the court held that the defendant's due process challenge to statements extracted from non-defendants could succeed only if she established that "the government's investigation methods resulted in a fundamentally unfair trial" (quoting *United States v. Chi-*

avola, 744 F.2d 1271, 1273 (CA7 1984)). Applying a form of harmless error analysis, and finding that the investigator's conduct was "not so egregious as to prompt exclusion of the evidence as a prophylactic measure," 764 F.2d at 274-75, the court in *Merkt* rejected the due process claim.

The district court's opinion in *Bradford v. Johnson*, 354 F. Supp. 1331 (E.D. Mich. 1972) – which the court of appeals adopted in its per curiam affirmance, 466 F.2d 66 (CA6 1973) – also attempted to gauge the fairness of the defendant's prosecution. It employed a different standard from the one used in *Merkt* or in the court below, finding that admission of a witness's coerced testimony violates due process when the degree of coercion is such as to render the evidence "untrustworthy." 354 F. Supp. at 1334-38. A similar approach was suggested in *United States v. Fredericks*, 586 F.2d 470 (CA5 1978). The court acknowledged that prosecutors "certainly would not be allowed to admit statements wrung from one of four criminal suspects through torture and unremitting prolonged interrogation in the trial of the other three suspects," but found that the police conduct at issue was "a far cry from [that] sort of third-degree physical or psychological coercion." *Id.* at 481. Moreover, the court noted, there was not "the slightest indication in the record that the reliability of [the non-defendant's] testimony, however involuntarily given, was at all suspect." *Ibid.*

As this summary of the cases demonstrates, there is great confusion among the federal courts of appeals and state courts about when the admission of evidence coerced from non-defendants violates the defendant's due process rights. The decision below, moreover, falls on the extreme end of the spectrum in holding that neither the manner by which the police procured Marshall's pretrial statement and Wrentz's testimony, nor the substantial doubt about the reliability of that evidence, was relevant to its admissibility.

Petitioner submits that the appropriate standard for reviewing a due process challenge to the admission of allegedly coerced witness testimony is whether that testimony was "voluntary." The considerations that mandate suppression of a defendant's involuntary confession[7] apply with equal force to involuntary testimony tendered into evidence through a non-defendant. In either setting, the probable unreliability of the testimony and, more important, the "deep-rooted feeling that the police must obey the law while enforcing the law," *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *see Jackson v. Denno*, 378 U.S. at 386; *LaFrance*, 499 F.2d at 34 ("a statement coerced from an accused is neither less trustworthy than one from a witness nor more offensive to society's sense of fairness"), render it inadmissible.

There is no constitutional basis for distinguishing among various forms or degrees of coercion, except for the purpose of determining whether a statement is voluntary. This Court has recognized in many cases that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *see Rogers v. Richmond*, 365 U.S. 534, 540-42 (1961); *Jackson v. Denno*, 378 U.S. at 389-90. As the Court noted in *Blackburn*, "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" 361 U.S. at 206. Concerns about integrity of the judicial process, and reliability of the evidence used to obtain a conviction, arise whenever improper coercion of any mode leads an individual to make an involuntary statement.

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[7] The voluntariness inquiry relates not to whether the declarant received *Miranda* warnings, but to whether his statement was the product of a free will, on the one hand, or the result of physical or psychological coercion by the police, on the other. *See, e.g., Rogers v. Richmond*, 365 U.S. 534, 540-45 (1961).

This Court repeatedly has held, in other circumstances, that witness evidence improperly manufactured by government agents cannot be used to secure a conviction. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); and *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), the Court forbade the prosecution's knowing use of perjured testimony. Evidence resulting from impermissibly suggestive lineups, showups, or other identification procedures likewise is inadmissible. *See Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

The involuntariness of Marshall and Wrentz's pretrial confessions can hardly be disputed. The confessions were procured only after the police subjected the individuals to highly coercive conditions and threatened them with incarceration, electrocution, death, and damnation. Neither man could have been convicted based upon his own statement, and there is substantial reason to believe (as did the district court, after holding an evidentiary hearing) that Wrentz's in-court testimony was a by-product of the police coercion. *See Bradford v. Michigan*, 394 U.S. 1022, 1024 (1969) (Warren, C.J., dissenting from denial of certiorari). The Court's conclusion in *Blackburn v. Alabama* is apposite here: "When the other pertinent circumstances are considered – the eight- to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn – the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious." 361 U.S. at 207-08.

The approach of the Sixth Circuit in *Bradford v. Johnson*, while less well-rooted in precedent, is a defensible

alternative to a pure "voluntariness" standard. Under that approach, a non-defendant's involuntary statement or testimony would be inadmissible if the police coercion had rendered the evidence "untrustworthy." Petitioner's due process claim clearly would succeed under this standard. The police coercion of Marshall and Wrentz was substantial, and both Marshall's pretrial statement and Wrentz's in-court testimony contain numerous indicia of unreliability.

Certiorari should be granted to identify the standard that governs due process challenges to the introduction of coerced statements and testimony by non-defendants. The Court thereby could eliminate the confusion and conflict in the lower courts on this issue, and correct the court below's determination that neither the involuntariness nor unreliability of the witness evidence was grounds for finding that Petitioner had been denied a fair trial.

II. THE COURT OF APPEALS ERRED IN CONCLUDING, CONTRARY TO OTHER FEDERAL AND STATE COURTS, THAT CROSS-EXAMINATION AND GENERAL JURY INSTRUCTIONS ARE ADEQUATE REMEDIES FOR THE ADMISSION OF THE COERCED STATEMENT OR TESTIMONY OF A NON-DEFENDANT.

A related matter on which the cases are in conflict concerns the proper remedy for introduction of a non-defendant's coerced statement or testimony. The court of appeals in this case, citing the Second Circuit's decision in *United States ex rel. Portelli v. LaVallee*, 469 F.2d 1239 (1972), held that the Petitioner's opportunity to cross-examine the witnesses and introduce other evidence, coupled with the trial court's general instructions to the jury on credibility determinations and the burden of proof, were sufficient safeguards to allow the coerced evidence to be admitted. 813 F.2d at 1149 (App. 21a-23a).

The better-reasoned cases, which draw on analogous decisions by this Court, are to the contrary. In *LaFrance v. Bohlinger*, 499 F.2d 29 (CA1 1974), the witness was examined fully about the alleged involuntariness of his statement implicating the defendant. Nevertheless, the court held that given the substantial issue as to the statement's voluntariness, it should not have been admitted without a prior determination by the judge, out of the jury's presence, that it was voluntary. *Id.* at 34-36. Similarly, in *People v. Underwood*, 37 Cal. Rptr. 313, 389 P.2d 937, 943 (1964), there was no indication that the witness had not been cross-examined about the circumstances of his pretrial statement, or that the usual jury instructions had not been given.[8] The court nonetheless reversed the conand noted that the jury had not been specifically instructed to disregard the witness's statement if it was involuntary. *Ibid.*

This Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), demonstrates that *LaFrance* and *Underwood* have much the better of the argument. In *Jackson v. Denno*, the Court held that whenever the voluntariness of a defendant's confession is fairly disputed, it can be received into evidence only if the trial court first finds, outside the presence of the jury, that it was voluntarily given. The Court doubted that a jury would be able to follow instructions to disregard completely the content of an involuntary confession, or even to evaluate fairly the evidence of involuntariness. *Id.* at 379-91.

The same is true of a witness's involuntary statement or testimony implicating the defendant. Even where the statement or testimony represents the involuntary product of police misconduct, a jury will be unable to ignore

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[8] In fact, the court noted that the general instruction advising the jury to consider prior inconsistent statements in evaluating credibility is misleading where the prior statement was involuntary. *Ibid.*

it. The trial court in this case permitted Marshall's statement and Wrentz's testimony to be admitted without making any independent determination that the evidence was voluntary. Nor did the jury even receive instructions – whatever their value would have been – to evaluate the voluntariness of the statement and testimony and to disregard them if involuntary.

The court of appeals' determination that cross-examination and boilerplate instructions sufficiently protected Petitioner's due process rights is contrary to *Jackson v. Denno* and common sense.[9] Given the heinous crimes with which Petitioner was charged, it simply is not reasonable to suggest, for example, that the jury would have completely disregarded Marshall's pretrial confession if it believed that, despite its involuntariness and unreliability, it was accurate. Certiorari should be granted to resolve the conflict among the lower courts and to correct the court of appeals' error concerning this issue.

III. THE COURT OF APPEALS ERRED IN SUGGESTING, CONTRARY TO NUMEROUS FEDERAL DECISIONS, THAT DUE PROCESS IS IMPLICATED BY POLICE MISCONDUCT ONLY IN ENTRAPMENT SITUATIONS, AND IN HOLDING THAT THE POLICE MISCONDUCT IN THIS CASE DID NOT SHOCK THE CONSCIENCE.

An independent basis for overturning Petitioner's convictions is that the police misconduct which accompanied those convictions is so shocking that it cannot be tolerated under the Due Process Clause. *Rochin v. California*, 342

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[9] Another flaw in the court of appeals' analysis is that it provides the police with no incentive to act responsibly in future interrogations. Police freedom to extract desired incriminating testimony from witnesses would be limited only by the willingness of juries to credit the coerced evidence.

U.S. 165, 172 (1952), and *United States v. Russell*, 411 U.S. 423, 431-32 (1973), require reversal of a conviction on due process grounds when it is attended by police misconduct that violates "fundamental fairness" and is "shocking to the universal sense of justice." *Ibid.* In addressing Petitioner's contention that the police misconduct in this case rose to this level of egregiousness, the court of appeals suggested that the principle described in *Russell* applies only to entrapment cases. 813 F.2d at 1148 (App. 19a). The court then held that, regardless of the doctrine's scope, the misconduct here was not shocking to its conscience. *Ibid.* (App. 20a).

The court of appeals' suggested limitation of the doctrine described in *Russell* contradicts the long line of cases that have applied it in non-entrapment settings. *Rochin* itself, of course, had nothing to do with sting operations. Rather, it involved an individual whose stomach was pumped against his will so that he would vomit certain morphine capsules, which then were used as evidence in his trial. *See* 342 U.S. at 166-68. Other non-entrapment cases which have applied the doctrine of police misconduct as described in *Russell* include *United States v. Toscanino*, 500 F.2d 267, 271-76 (CA2 1974), and *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 63-66 (CA2 1975), which both involved due process challenges to district court jurisdiction where the authorities transported the defendant to the jurisdiction without following proper extradition procedures.

The court of appeals also erred in ruling that the police misconduct was not sufficiently egregious to violate due process. This ruling reversed an emphatic district court holding on the issue: "It is clear beyond any question whatsoever that the police misconduct in this case 'shocks the conscience'." 626 F. Supp. at 784 (App. 89a). Given the undisputed record evidence, including the investigating officers' knowledge that Wrentz and Marshall were particu-

larly susceptible to their coercive tactics; the officers' clear intent to obtain statements incriminating Petitioner; their suggestion of the answers that would allow the witnesses to avoid punishment and go home; and the other abusive, intimidating tactics used throughout the numerous interrogations, the district court's conclusion was sound. In reversing that conclusion, which the district court had reached after conducting an evidentiary hearing and carefully studying the tapes and transcripts of the interrogations, *id.* at 772 (App. 60a-63a), the court of appeals committed clear error which this Court should correct by granting certiorari.

IV. A CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE UNDER *JACKSON v. VIRGINIA* WHERE THE ONLY EVIDENCE SUPPORTING THE CONVICTION CONSISTS OF THE TESTIMONY OF ONE WITNESS, AND WHERE THAT TESTIMONY IS PHYSICALLY IMPOSSIBLE, SELF-CONTRADICTORY, AND TAINTED BY THE COERCIVE POLICE INTERROGATIONS WHICH PROCURED IT.

Under *Jackson v. Virginia*, 443 U.S. 307 (1979), Petitioner is entitled to habeas corpus relief if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. This Court never has defined what constitutes "rational" evidence or, alternatively stated, how far a court should inquire into credibility determinations under *Jackson*. Lower courts addressing this issue have held that evidence which is inherently incredible or physically impossible does not meet *Jackson*'s rationality component. *See United States v. Chancey*, 715 F.2d 543, 546-47 (CA11 1983); *see generally United States v. Shelton*, 588 F.2d 1242, 1245 (CA9 1978).

In *Chancey*, for example, the defendant was found guilty of transporting a teen-age girl in interstate commerce against her will. The court of appeals reversed

the conviction because the supporting testimony was "so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt." 715 F.2d at 546. Specifically, the court found incredible the alleged victim's testimony that she was transported against her will, in light of her admission that she had declined numerous safe opportunities to seek help or escape. *Id.* at 547.

Similarly, Wrentz's trial testimony – which provides the sole evidence supporting Petitioner's convictions – does not meet *Jackson*'s rationality component. On direct examination Wrentz testified that on August 31, 1972, he – along with Petitioner, Petitioner's father, and Marshall – dug a hole and buried a box containing Hanks's body in a field in Valdosta. On cross-examination, Wrentz flatly and completely repudiated every material aspect of this testimony. He stated that he lacked any knowledge regarding Hanks's disappearance or burial because he was on a work assignment in Florida from August 31 until September 2.[10] Wrentz thus testified to an occurrence which is physically impossible: that he was in two different places at the exact same time.

The court of appeals, in concluding that rational jurors could have found Petitioner guilty based upon Wrentz's testimony, considered only his direct examination and corroborating circumstances. *See* 813 F.2d at 1146 (App. 15a-16a). By disregarding Wrentz's testimony on cross-examination, the court avoided grappling with the internal inconsistency and physical impossibility of his testimony as a whole. Nor did the court of appeals consider the gen-

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[10] Wrentz did testify on cross-examination that he remembered digging a hole, though he could not remember when or where he had done so and insisted that he was not involved in the burial of a box containing Hanks's body. 626 F. Supp. at 771 (App. 59a).

eral incoherence of Wrentz's testimony, or the fact that it was tainted by the police misconduct described earlier in this Petition.

In short, the court of appeals abdicated its responsibility under *Jackson v. Virginia*, 443 U.S. at 319-24, to consider all of the evidence in determining whether it supported the convictions. Similarly, the *Chancey* court would have been wrong to consider only the alleged victim's testimony that she had been transported involuntarily, and not that portion of her testimony which demonstrated otherwise. *See generally Blackburn v. Alabama*, 361 U.S. at 208-09 (expert witness's testimony was "in such a hopeless internal conflict" that it did not raise a genuine issue of fact regarding an insanity determination).

The court of appeals' approach is indistinguishable from the "any evidence" standard of *Thompson v. Louisville*, 362 U.S. 199, 204-05 (1960), which *Jackson v. Virginia* expressly overruled. *See* 443 U.S. at 319-20. The district court was correct in concluding that "*it insults rational thought to attribute to Mr. Wrentz's testimony the degree of credibility necessary to justify a conviction.*" 626 F. Supp. at 771 (App. 59a) (emphasis in original). Review should be granted to prevent the erosion of the *Jackson* standard and to provide guidance as to what constitutes "rational" evidence.

CONCLUSION

Petitioner was convicted based upon contradictory and incredible testimony which was procured through egregious police misconduct in the investigation of the charged crimes. This Court should grant certiorari to resolve the conflicts among the lower courts described herein, and to correct clear errors by the United States Court of Appeals for the Eleventh Circuit. Given the insufficiency of the evidence, Petitioner's convictions should be reversed and the State should be barred from retrying him. At the very

least, Petitioner should receive a new, fair trial at which his guilt or innocence can be adjudicated in accordance with the dictates of due process.

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August 7, 1987

APPENDIX

Text of Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in relevant part:

> . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the Constitution provides in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

In The
United States Court of Appeals
For the Eleventh Circuit

No. 86-8060.

E.K. WILCOX, Jr., Petitioner-Appellee,
Cross-Appellant,

v.

J. Paul FORD, Warden, Respondent-Appellee,
Cross-Appellee.

April 3, 1987.

State prisoner, whose murder and concealing death conviction was confirmed by the Georgia Supreme Court, 250 Ga. 745, 301 S.E.2d 251, sought writ of habeas corpus. The United States District Court for the Middle District of Georgia, No. CA-84-78-VAL, 626 F.Supp. 760, Wilbur D. Owens, Jr., Chief Judge, granted the application for writ of habeas corpus. Warden appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) evidence was sufficient to support conviction; (2) witness, who testified as to prisoner's participation in murder and unlawful concealment of death was not so inherently incredible that no reasonable person would have believed his testimony: (3) police misconduct was not so egregious so as to constitute violation of prisoner's due process rights; and (4) prisoner was not entitled to be released on bail; district court erred in finding that prisoner had likelihood of success on appeal.

Affirmed in part; vacated in part, and remanded.

1. Habeas Corpus 25.1(9)

Simple fact that evidence gives some support to defendants theory of innocence does not warrant grant of habeas corpus.

2. Habeas Corpus 113(12)

Issue of whether state court's findings are sufficient to support conviction under *Jackson*, in which United States Supreme Court stated that Court of Appeals' task in addressing claim of insufficient evidence to convict on habeas review is to determine whether any rational trier of fact would have found proof of guilt beyond reasonable doubt, is mixed question of law and fact subject to plenary review.

3. Criminal Law 82

Homicide 250

Evidence presented by state was clearly sufficient to support defendant's conviction for both murder and unlawful concealment of death; several witnesses testified that defendant had been sexually harassing victim in weeks prior to murder and that victim was afraid of defendant, defendant's statement as to his whereabouts on day of murder conflicted with testmony of other witnesses, direct testimony of witness gave jury basis to conclude that defendant and others put victim's body in wooden box, dismimbering her legs at knees in order to fit body into box, and prosecution's expert medical witnesses supported testimony that victim's legs had been dismembered below the knee.

4. Habeas Corpus 45.2(6)

Even if habeas petitioner's conviction of murder and unlawful concealment of death was improper in light of "higher" state standard, federal habeas court is not concerned with violation of state law unless violation raises federal constitutional problems.

5. Criminal Law 553

While witness' testimony was to some extent confused and self-contradicting, testimony witness gave on direct examination as to events on day of murder was not at odds with ordinary common sense or physically impossible under laws of nature and many aspects of his testimony were corroborated by other evidence, such as indications of dismemberment of body, and fact that it rained at time in question, and his testimony as to time burial took place was consistent with two periods of time during day for which defendant and his father were unaccounted for except by their own testimony; thus, district court erred in disregarding witness' testimony.

6. Criminal Law 742(1)

Credibility of witness' testimony, with all of its contradictions and confusions, was properly question for jury.

7. Constitutional Law 266.1(4)

Police misconduct was not so egregious as to constitute violation of defendant's due process rights; even though transcript reflected that interrogating officers threatened to charge witness with murder, threatened to lynch him, put words in his mouth and told him he was headed for eternal damnation, and subjected second witness to similar treatment, review of tapes and transcripts did not indicate any evidence of physical abuse or threats or improper inducements or promises in exchange for statement implicating defendant. U.S.C.A. Const.Amend. 5.

8. Witnesses 397

Defendant's trial was not rendered fundamentally unfair by admission of "unreliable" and "inflammatory" direct testimony of first witness and prior statement of second witness for impeachment purposes; even assuming that police employed improper interrogation techniques to obtain witnesses' out-of-court statements, implicating defendant in crime, only second witness' out-of-court state-

ment was actually introduced at trail, and then only on cross-examination for limited purpose of impeachment, and defendant had full opportunity to repair any damage impeaching statement might have caused, and defendant had adequate tools in hand to challenge both witnesses' reliability.

9. Jury 103(6)

Defendant was not entitled to have two jurors, first of whom admitted that she had "inclination" as to defendant's guilt, and second who stated that she could have "formed an opinion" as to defendant's guilt, struck for cause; both jurors stated upon further questioning that they would be able to decide case solely on basis of evidence presented in court and laws given by judge.

10. Criminal Law 1144.8

Trial court's resolution of question of whether particular juror has opinions which disqualify him, is question of fact entitled to special deference.

11. Constitutional Law 267

Jury 131(7)

Trial court did not deny defendant's Sixth and Fourteenth Amendment rights by refusing to allow him to ask two potential jury members whether their preconceived notions were toward innocence or guilt; both jurors admitted during voir dire that they had preconceived notions but said that they would be able to disregard leaning and decide case solely on evidence. U.S.C.A. Const.Amends. 6, 14.

12. Jury 131(2)

Under both federal and state law, trial judge is accorded wide discretion in ascertaining what questions can and cannot be asked in voir dire.

13. Jury 131

Purpose of voir dire is to ascertain whether potential juror can render verdict solely on basis of evidence presented and charge of trial court.

14. Habeas Corpus 71

Habeas petitioner was not entitled to be released on bail; district court erred in finding that petitioner had likelihood of success on appeal from convictions of murder and unlawful concealment of death.

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Appeals from the United States District Court for the Middle district of Georgia.

Before FAY and JOHNSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This is an appeal taken by Warden J. Paul Ford from a district court order granting habeas corpus relief to appellee E.K. Wilcox, Jr., 626 F.Supp. 760 (1985). Ford also appeals the district court's decision to grant bail to Wilcox. Wilcox cross-appeals the district court's dismissal of the remaining claims in his petition. We reverse the portion of the district court's opinion granting habeas corpus relief, affirm the portion of the district court's opinion denying habeas corpus relief, and reverse the district court's order granting bail to the appellee.

E.K. Wilcox, Jr., was indicted by a grand jury in Lowndes County, Georgia, in March 1981 for the murder of Hellen Hanks and the unlawful concealment of her death. Wilcox was tried before a jury and found guilty on both counts. A summary of the critical facts developed at trial

is attached to this opinion as an appendix. Wilcox was sentenced to life imprisonment for the murder and to a consecutive twelve month sentence for unlawful concealment of a death.

Wilcox appealed to the Supreme Court of Georgia. His conviction was affirmed. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983). He then filed a writ of habeas corpus in the Superior Court of Muscogee County, Georgia. The court held a hearing on the petition for relief on November 17, 1983. The petition was denied on March 9, 1984. The Supreme Court of Georgia then denied Wilcox's application for a certificate of probable cause to appeal the decision of the state habeas court.

Wilcox filed an application for a writ of habeas corpus in the United States District Court for the Middle District of Georgia on September 17, 1984. The application set forth six grounds for relief: 1) the state obtained his conviction with insufficient evidence; 2) the police investigation of the crime involved police misconduct so fundamentally unfair that it violated due process; 3) the trial court improperly prohibited Wilcox's counsel from questioning two veniremen concerning their leanings as to which party ought to prevail; 4) the trial court erred in failing to strike for cause two veniremen who admitted on voir dire that they had a preconceived notion that Wilcox was guilty; 5) the admission of testimony coerced from two Wilcox employees (Wrentz and Marshall) violated Wilcox's due process rights; and 6) the false answer during voir dire of a venireman eventually selected to sit as juror violated Wilcox's Sixth Amendment and due process rights.[1]

On July 9, 1985, the district court held an evidentiary hearing on the question of whether Wrentz' and Marshall's testimony had been coerced. On December 20, 1985, the district court granted the application for habeas relief. Ten

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[1] This is the only grounds for relief asserted in the petition for habeas corpus that is not asserted before this court on appeal.

days later, on December 30, 1985, the federal heas court also ordered that Wilcox be released on bond.

The district court granted the writ on the first two grounds for relief asserted in the petition and dismissed the other four claims as meritless. The district court held that the *Jackson v. Virginia*[2] standard was not satisfied by the evidence presented in this case because no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. The court concluded that the evidence was insufficient for two reasons: 1) the evidence at trial presented an alternative hypothesis to explain Hellen Hanks' death, and that hypothesis raised a reasonable doubt as to Wilcox, Jr.'s guilt; and 2) the only testimony linking Wilcox, Jr., with Hellen Hank's death, the testimony of Ed Wrentz, could not be accepted as true by a rational trier of fact. The court further concluded that, since the writ was issued on grounds of insufficiency of evidence, the state would be barred from retrying Wilcox.

The district court held in the alternative that the police misconduct in the case in interrogating Wrentz and Marshall "shocked the conscience", thereby violating due process. As a result, the court held, Wilcox would be entitled to a new trial even if there had been sufficient evidence to convict Wilcox under *Jackson v. Virginia.*

Sufficiency of the Evidence

Warden Ford's first contention on appeal is that the district court erred in concluding that the evidence adduced at trial was insufficient to support Wilcox's conviction. In the seminal case of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court stated that our task in addressing such a claim on habeas review is to determine whether any rational trier of fact would have found proof of guilt

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[2] 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

beyond a reasonable doubt. 443 U.S. at 319, 99 S.Ct. at 2789; *see Stoner v. Graddick*, 751 F.2d 1535, 1547 (11th Cir.1985); *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215 (11th Cir.1983). In applying this test, we must review the evidence in the light most favorable to the prosecution. *Jackson, supra*, 443 U.S. at 319, 99 S.Ct. at 2789; *Stoner, supra*, 751 F.2d at 1547; *Cosby v. Jones*, 682 F.2d 1373, 1379 (11th Cir.1982).

[1, 2] The federal courts have consistently reiterated that this standard for weighing the constitutional sufficiency of the evidence is a limited one. *See, e.g., Martin v. State of Alabama*, 730 F.2d 721, 724 (11th Cir.1984). It is not required that the evidence rule out every hypothesis except that of guilt beyond a reasonable doubt. *Jackson supra*, 443 U.S. at 326, 99 S.Ct. at 2792; *Martin, supra*, 730 F.2d at 724. Faced with a record of historical facts that supports conflicting inferences we must presume that the jury resolved such conflicts in favor of the prosecution, deferring to the jury's judgment as to the weight and credibility of the evidence. *See Jackson, supra*, 443 U.S. at 326, 99 S.Ct. at 2792; *Machin v. Wainwright*, 758 F.2d 1431 1435 (11th Cir.1985); *Cobb v. Wainwright*, 666 F.2d 966, 971 (5th Cir.), *cert. denied*, 457 U.S. 1107, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). The simple fact that the evidence gives some support to the defendant's theory of innocence does not warrant the grant of habeas relief. *Martin, supra*, 730 F.2d at 724; *Cosby, supra*, 682 F.2d at 1388 and n. 21.[3]

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[3] Furthermore, the state court's findings of facts are entitled to a presumption of correctness. 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The issue of whether the state court's findings are sufficient to support a conviction under the *Jackson* standard is a mixed question of law and fact subject to plenary review. *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir. 1982), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983).

In determining whether the facts of a particular case satisfy the *Jackson* standard, it is necessary to refer to the essential elements of the crimes as defined by state law. *See Jackson, supra,* 443 U.S. at 324 n. 16, 99 S.Ct. at 2792 n. 16; *Buffo v. Graddick,* 742 F.2d 592, 595 (11th Cir.1984). The crimes charged in this case are murder and unlawful concealment of a death. Under Georgia law, "[a] person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." O.C.G.A. § 16-5-1(a) (1981); *see Holloway v. McElroy,* 474 F.Supp. 1363, 1367-68 (M.D.Ga.1979), *aff'd,* 632 F.2d 605 (5th Cir.1980), *cert. denied,* 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). Express malice is defined as the "deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof." *Id.* at § 16-5-1(b). Implied malice exists "where no considerable provacation appears and where all the circumstances of the killing show an abandoned and malignant heart." *Id.* A person commits the misdemeanor of concealing death if "by concealing the death of any other person, [he] hinders a discovery of whether or not such person was unlawfully killed." O.C.G.A. § 16-10-31.[4]

[3] Appellee E.K. Wilcox, Jr., argues that the evidence at trial was insufficient to support his conviction on two grounds: 1) the evidence does not satisfy the *Jackson v. Virginia* standard because it gives equal or nearly equal circumstantial support to a theory of guilt and theory of innocence; and 2) even if the evidence as a whole meets the *Jackson* standard, the court should disregard the testimony of Ed Wrentz as incredible, and without the testimony of Wrentz there is clearly insufficient evidence to

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[4] An individual can also be held criminally responsible for either crime under Georgia law if he aids or abets the commission of the crime. O.C.G.A. § 16-2-20.

convict Wilcox of either crime. We reject both arguments and hold that the evidence presented by the State was clearly sufficient to support Wilcox's conviction for both murder and unlawful concealment of death.

Considering all of the evidence in a light most favorable to the prosecution including the testimony of Ed Wretnz,[5] we find that it provided a sufficient basis for the jury to conclude that E.K. Wilcox, Jr., murdered Hellen Hanks and then concealed her death by surreptitiously burying her body in a field. The prosecution's expert medical testimony identified the body as Hellen Hanks and gave the jury a reasonable basis to conclude that Hanks had been strangled in connection with a sexual assault. Several witnesses testified that E.K. Wilcox, Jr., had been sexually harrassing Hanks in the weeks prior to her murder and that she was afraid of him. Other witnesses gave testimony indicating that Wilcox, Jr., arrived at the Wilcox offices in Valdosta on the day of the murder at around 3:00 or 3:30 rather than at 4:15 or 4:30 as claimed by Wilcox giving rise to the inference that Wilcox, Jr. and the victim were together at the Wilcox offices for some period of time in the afternoon. The evidence also showed that Wilcox did not report Hanks as missing until 4:45 or 5:00 that afternoon.

Furthermore, Wrentz's direct testimony gave the jury a basis to conclude that later that same evening, Wilcox, Jr., Wilcox, Sr., Wrentz and Marshall put Hanks' body in a wooden box belonging to Wilcox Advertising Company, dismembering her legs at the knees in order to fit her body into the box. The prosecution's expert medical witnesses supported Wrentz's testimony that Hank's legs had been dismembered below the knee. Wrentz testified that the four men drove into the country and buried the box, together with Hanks' clothes and various of her belong-

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[5] *See* discussion *infra* as to whether Wrentz's testimony should be disregarded.

ings, in the field where her body was discovered eight years later. Other evidence and testimony as to the physical condition of the burial site, the location of various items in and around the burial box, and the description of the site itself all corroborated Wrentz's description of the burial and the burial site. Finally, various witnesses identified the burial box and various items found in or around the box as belonging to Wilcox Advertising Company.

From this evidence, taken together with the rest of the evidence introduced at trial in support of the prosecution's case, we find that a reasonable jury could have concluded beyond a reasonable doubt that Wilcox, Jr., caused the death of Hellen Hanks with malice aforethought and that he hindered the discovery of the fact that she was unlawfully killed. The jury could have disbelieved the testimony of the two Wilcoxes and credited Wrentz's account of the events of the evening of the murder, as well as crediting the testimony of Wilcox, Jr.'s ex-wife and other witnesses indicating that Wilcox, Jr.'s location and activities were unaccounted for during two prolonged periods of time the afternoon and evening of Hanks' disappearance.

[4] While Wilcox introduced exculpating evidence on various points, we must presume that the jury resolved the conflicts in the evidence in favor of the prosecution. *Jackson, supra*, 443 U.S. at 326, 99 S.Ct. at 2792. Given our conclusion that the prosecution's evidence provides a sufficient basis for the conviction, conflicting evidence alone does not undermine that conclusion of sufficiency so long as a rational factfinder could have credited one side of the conflicting testimony over the other.[6] *See Stoner*

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[6] This is particularly true since a significant portion of Wilcox, Jr.'s defense is based upon his own testimony and the testimony of his father. The jury had a full opportunity to observe the demeanor and assess the credibility of both witnesses, and was free to assess and weigh their testimony based upon their observations.

v. Graddick, supra, 751 F.2d at 1547. We do not find the evidence supporting Wilcox's defense is so strong that a rational factfinder would have necessarily credited his evidence over the prosecution's evidence or have entertained a reasonable doubt as to Wilcox's guilt. Rather, while the jury theoretically *might* have refused to convict Wilcox had they believed his story, the prosecution's evidence was enough to support a guilty verdict on both charges if the jury chose to credit that evidence over the defendant's evidence.[7]

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[7] The district court's finding that Wilcox was not convicted by sufficient evidence relies heavily on its conclusion that Wilcox is entitled to the protection of a Georgia evidentiary provision governing convictions based upon circumstantial evidence. O.C.G.A. § 24-4-6. That section provides that "[t]o warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, *but shall exclude every other reasonable hypothesis save that of the guilt of the accused.*" (emphasis added). *See Barnett v. State*, 153 Ga.App. 430, 265 S.E.2d 348, 350 (1980). The Georgia courts have held that an appellate court reviewing a conviction based on circumstantial evidence should not undertake to weigh the evidence, but should examine whether there is sufficient competent evidence to support the verdict when viewed in the light most favorable to the verdict. *Hopkins v. State*, 167 Ga.App. 811, 307 S.E.2d 707, 711 (1983). *Shockley v. State*, 166 Ga.App.182, 303 S.E.2d 519, 520 (1983). The state courts have explained that O.C.G.A. § 24-4-6- "does not mean that the act by bare possibility could have been done by somebody else, but that the state must show to a moral certainty that it was the defendant's act." *Hopkins, supra*, 307 S.E.2d at 711 (quoting *Hunter v. State*, 91 Ga.App. 136, 85 S.E.2d 90, 92 (Ga.App.1954)).

While the appellant does not really challenge the district court's reliance on the state evidentiary statute, we believe it merits some discussion. The district court concluded that, under the higher standard of proof required by O.C.G.A. § 24-4-6, Wilcox was convicted based upon insufficient evidence because the evidence at trial did not exclude very other reasonable hypothesis save that of Wilcox's guilt. Both the district court's reliance on the state provision in its analysis

(Footnote continued on the following page)

[5] Nor do we find that we could or should disregard the testimony of Ed Wrentz in reviewing the sufficiency of the evidence under the *Jackson* standard.[8] Wilcox argues that the sole evidence linking him to the crime, Wrentz's testimony, is so incredible that it cannot provide a rational

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7 *(Continued)*

and its conclusion that the state standard was not satisfied are erroneous. Although O.C.G.A. § 24-4-6 is designated as a rule of evidence, in substance it is actually a standard of proof required for a conviction based upon circumstantial evidence. As a federal habeas court, our review of the petitioner's conviction is limited to a consideration of whether the evidence is sufficient *as a matter of federal constitutional law. See Jackson, supra,* 443 U.S. at 319-21, 99 S.Ct. at 2789-90; *Machin, supra,* 758 F.2d at 1434. In setting out the federal constitutional standard in *Jackson v. Virginia,* the Supreme Court expressly rejected the standard of proof now embodied in O.C.G.A. § 24-4-6, 443 U.S. at 326, 99 S.Ct. at 2792, and that state standard has no place in our sufficiency of the evidence analysis.

Furthermore, even if the petitioner's conviction was improper in light of the "higher" state standard, a federal habeas court is not concerned with violations of state law unless the violation raises federal constitutional problems. *See Machin, supra,* 758 F.2d at 1434; *Rodriguez supra,* 740 F.2d at 886; *Corn v. Zant,* 708 F.2d 549, 555 (11th Cir.1983), *cert. denied,* 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). We acknowledge, as have other courts, that a state conviction which meets the *Jackson* standard but does not meet a higher state standard may create a due process issue, *see Parker v. Procunier,* 763 F.2d 665, 666 n. 1 (5th Cir.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 159 88 L.Ed.2d 132 (1985); *Tarpley v. Estelle,* 703 F.2d 157, 162 n. 8 (5th Cir.), *cert. denied,* 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); *Holloway v. McElroy, supra,* 662 F.2d at 640 n. 55, but we need not reach that issue here because we conclude that the "higher" state standard *was* satisfied in this case, contrary to the district court's conclusion.

[8] The state conceded at oral argument that the evidence against Wilcox might indeed be insufficient if the testimony of Wrentz were disregarded.

basis for the verdict.[9] He argues that Wrentz's testimony was internally inconsistent, confused and contradicted by all of the other individuals allegedly involved in the body burying operation,' Lorenzo Marshall, Wilcox, Jr., and Wilcox, Sr.

As discussed above, it is a firmly established principle of constitutional law that a defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. *Jackson v. Virginia, supra,* 443 U.S. at 319, 99 S.Ct. at 2789 (emphasis added); *United States v. Chauncey,* 715 F.2d 543, 546 (11th Cir.1983). Based upon *Jackson's* "rationality" requirement, this circuit has held that a reviewing court may disregard testimony when it is "so inherently incredible, so contrary to the teachings of human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt." *Chauncey, supra,* 715 F.2d at 546; *See United States v. Rivera,* 775 F.2d 1559, 1561 (11th Cir.1985), *cert. denied* ___ U.S. ___, 106 S.Ct. 1275, 89 L.Ed.2d 582 (1986); *United States v. Garner,* 581 F.2d 481, 485-86 (5th Cir.1978); *United States v. Cravero,* 530 F.2d 666, 670 (5th Cir.1976).

The issue before us now is whether Ed Wrentz's testimony is so "inherently incredible . . . that no reasonable person would believe it beyond a reasonable doubt." While Wrentz's testimony was to some extent confused and self-contradicting, we find that the testimony he gave on direct examination is not at odds with ordinary

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[9] The district court agreed with Wilcox, writing that "[given] Mr. Wrentz's inconsistent and at times incoherent testimony in light of the testimony given by Mr. Marshall and his corroborating witnesses, *it insults rational thought to attribute to Mr. Wrentz's testimony the degree of credibility necessary to justify a conviction for murder and life imprisonment.*" (emphasis in original).

common sense or physically impossible under the laws of nature. The account of events given by Wrentz very well could have occurred. More than that, many aspects of his testimony are corroborated by other evidence, such as the indications of dismemberment, the fact that it rained the night of August 31, and the description of the burial site. Furthermore, Wrentz's testimony as to the time of day the burial took place is consistent with the two periods of time during the day for which Wilcox, Jr., and Sr. were unaccounted except by their own testimony.

[6] The credibility of Wrentz's testimony, with all of its contradictions and confusion, was properly a question for the jury. *See Rodriguez v. Wainwright*, 740 F.2d 884, 886 (11th Cir.1984), *cert. denied*, 469 U.S. 1113, 105 S.Ct. 797, 83 L.Ed.2d 790 (1985). The jury made a collective decision to believe his testimony after observing him on the stand and hearing the defense's thorough cross-examination of his direct testimony. We leave that credibility determination with the jury, where it properly belongs, and conclude that Ed Wrentz's testimony was not incredible as a matter of law. Consequently, we adhere to our conclusion that the district court erred in evaluating the sufficiency of the evidence against Wilcox.

Police Misconduct

[7] Warden Ford's second argument on appeal is that the district court erred in its alternative holding that Wilcox was entitled to a new trial based on the fact that the police misconduct in this case violated his due process rights. The district court held that the "intimidation tactics" employed by the police in interrogating three employees of the Wilcox business, including Ed Wrentz, violated Wilcox's Fifth Amendment right to due process.[10]

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[10] The district court held an evidentiary hearing on this issue, reviewed transcripts from and listened to several tapes from the police interrogations of the witnesses.

Upon carefully reviewing the record, however, we find that the district court erred in concluding that the police misconduct in this case was so egregious as to constitute a violation of Wilcox's due process rights.[11]

The district court held that outrageous government conduct occurred based on the police interrogation of three Wilcox Advertising Company employees: Wrentz, Marshall, and an employee that did not testify at trial, John Goodman. The district court concluded that the manner in which the investigating police officers interrogated these three men "shock[ed] [his] conscience." During the course of their interrogation the police officers told Goodman, a thirty-five year old black man, that they planned to hold him indefinitely and that they would "fry his ass". They also insinuated that they had found his fingerprints on the burial box. Goodman consistently denied knowing anything about Hellen's disappearance.

Both Marshall and Wrentz, however, initially stated that they did not know anything but eventually signed statements attesting to the hole digging story related above. Wrentz was a very old, illiterate black man with what one police officer described as the "old slave syndrome." The police officer testified that he discovered that Wrentz would agree to anything a white man asked him in a leading question format. The transcripts reflect that the interrogating officers threatened to charge Wrentz with murder, threatened to lynch him, put words in his mouth, and told him he was headed for eternal damnation.

Marshall received similar treatment. He was in his

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[11] We will conduct a plenary review of the district court's determination of police misconduct, but give the state court findings of fact on the issue a presumption of correctness. *Miller v. Fenton*, ___ U.S. ___, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). The district court's decision as to the proper remedy for the misconduct is subject to plenary review. *Id.*

late sixties at the time of the interrogation and illiterate. Marshall was interrogated for eight and a half hours without being provided with food or water. The officers then threatened to send him to the electric chair along with two other Wilcox employees and also told him that he would die in prison. He repeatedly told the officers that he was in Albany, Georgia, the week that Hanks disappeared and denied digging a hole. Marshall corroborated Wrentz's story only after the police brought Wrentz into the room and Wrentz repeated his story in front of Marshall. Marshall later recanted the statement and explained that he had only made it because he was afraid and wanted to go home.

Wilcox's due process claim derives from the United States Supreme Court case *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), and its progeny. Based upon the general principle that criminal prosecutions must meet the bare minimum requirements of due process under the Fifth Amendment of the Constitution,[12] the Supreme Court in *Russell* recognized that a conviction could be overturned where government involvement in the investigation and prosecution of the crime is so outrageous that it violates "fundamental fairness, shocking to the universal sense of justice." *Russell, supra*, 411 U.S. at 431-32, 93 S.Ct. at 1642-43; *see also Owen v. Wainwright*, 806 F.2d 1519, 1521 (11th Cir.1986) (per curiam); *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984). The question of whether government involvement in a criminal scheme rises to the level of a due process violation "turn[s] on the totality of the circumstances, with no single factor

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[12] *See Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S.Ct. 1774, 1785, 12 L.Ed.2d 908 (1964).

controlling." *Haimowitz*, 725 F.2d at 1577; *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir.1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982). The defense is only available in the "rarest and most outrageous circumstances." *Tobias*, *supra*, 662 F.2d at 387.

Wilcox argues that the police interrogation of Wrentz, Marshall and Goodman "shocks the universal sense of justice" and therefore violates *his* due process rights under the principles articulated in *Russell*.[13] After reviewing the reported cases applying *Russell*, however, we find that this case is clearly distinguishable from *Russell* and its progeny on the facts. The term "government misconduct" is actually an overbroad misnomer: the "government misconduct" at issue in the *Russell* line of cases has been confined to alleged government over-involvement in the planning and/or execution of a crime in a sting or reverse sting operation, rather than to a more general concept of government misconduct. *See, e.g.*, *Russell*, *supra*, 411 U.S. at 423, 93 S.Ct. at 1637; *Owen*, *supra*, at 1521; *Haimowitz*, *supra*, 725 F.2d at 1577; *Tobias*, *supra*, 662 F.2d at 386; *United States v. Sayers*, 698 F.2d 1128, 1130 (11th Cir.1983); *United States v. Gianni*, 678 F.2d 956, 959-60 (11th Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d

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[13] We note that Wilcox could not assert that the police interrogation tactics utilized against Wrentz, Marshall and Goodman violated the constitutional rights of the three witnesses because he would not have standing to raise their constitutional claims. *Eisenstadt v. Baird*, 405 U.S. 438, 443-46, 92 S.Ct. 1029, 1033-34, 31 L.Ed.2d 349 (1972); *United States v. Fredericks*, 586 F.2d 470, 480 (5th Cir.1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979); *United States v. Scallion*, 533 F.2d 903, 916 (5th Cir.), *cert. denied*, 429 U.S. 1079, 97 S.Ct. 824, 50 L.Ed.2d 799 (1976). Instead, Wilcox claims that the police treatment of the three witnesses violates *his* personal due process rights, thereby obviating any standing problem. *See United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985); *Fredericks*, *supra*, 586 F.2d at 480.

633 (1982). The allegation of misconduct in this case, improper interrogation of witnesses, is not a claim that the police were over-involved in the planning or execution of the crime. This Circuit has not yet passed upon whether *Russell* may be read more broadly to apply outside of the narrow context of government over-involvement in a sting operation.

While we do not hold that *Russell* can never apply to a situation other than one alleging police over involvement in a sting operation, we do hold that it does not apply to the facts of this case. The police misconduct here, while not commendable, [14] is not so extreme that it violates a sense of "fundamental fairness, shocking to the universal justice" as far as Wilcox's constitutional rights are concerned. Nor do we find that this case presents "the rarest and most egregious circumstances" which might justify finding that Wilcox's due process rights were violated under *Russell*. Our review of the tapes and transcripts does not indicate any evidence of physical abuse or threats or improper inducements or promises in exchange for a statement implicating the defendant. We reverse the district court's finding that the police misconduct in this case violated Wilcox's due process rights.

Admission of Coerced Testimony

[8] Wilcox on cross-appeal argues that the admission of the "unreliable" and "inflammatory" direct testimony of Wrentz and prior statement of Marshall for impeachment purposes rendered his trial fundamentally unfair.[15] The

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[14] In addressing this issue on direct review, the Supreme Court of Georgia held that, while it did not condone the police interrogations of the three witnesses, it perceived no basis for overturning the conviction. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251, 259-60 (1983).

[15] We will apply a plenary standard of review on this issue.

(Footnote continued on the following page)

district court dismissed this claim as meritless. We agree with the district court.

It is well settled that the admission of evidence which renders a trial fundamentally unfair warrants a new trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Even more to the point, the courts have held that the admission at trial of improperly obtained statements which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial. *See United States v. Merkt*, 764 F.2d 266, 274 (5th Cir.1985); *United States v. Chiavola*, 744 F.2d 1271, 1273-74 (7th Cir.1984); *United States ex rel Cunningham v. DeRobertis*, 719 F.2d 892, 895-96 (7th Cir.1983); *United States v. Fredericks*, 586 F.2d 470, 480 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979); *LaFrance v. Bohlinger*, 499 F.2d 29, 34-35 (1st Cir.), *cert. denied*, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d 674 (1974).

Viewing the circumstances of the trial as a whole, it is apparent that the admission of Wrentz's direct testimony and Marshall's prior statement was not improper and did not result in a fundamentally unfair trial. The Georgia Supreme Court found that the evidence was properly admissible as a matter of state evidentiary law,[16] and while that is not dispositive of the federal constitutional question, the opportunity for cross-examination, admission of contradictory evidence, and the jury charges rendered by the trial court gave the jury adequate opportunity to assess the proper weight to be accorded to the challenged evidence. *See United States ex rel. Portelli v. LaVallee*, 469 F.2d 1239, 1240 (2d Cir.1972), *cert. denied*, 411 U.S. 950, 93 S.Ct. 1939, 36 L.Ed.2d 412 (1973).

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15 *(Continued)*

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

[16] *Wilcox v. State*, *supra*, 301 S.E.2d at 259.

Even assuming that the police employed improper interrogation techniques to obtain Marshall's and Wrentz's out-of-court statements implicating Wilcox in the crime, only Marshall's out-of-court statement was actually introduced at trial. As the court's charge to the jury clearly informed them, Marshall's out-of-court statement was only introduced on cross-examination for the limited purpose of impeachment. The defendant had a full opportunity to repair any damage the impeaching statement might have caused to the credibility of Marshall's direct testimony by calling the two witnesses who testified that they had been with Marshall in Albany on the date in question.

As far as Wrentz's direct testimony is concerned, Wilcox has offered no real reason why the testimony was improperly admitted, beyond the claim that it is unreliable and inflammatory. While his testimony was to some degree confused and contradictory, it was highly relevant. There is no proof that Wrentz was incompetent to testify or that his in-court testimony was coerced. *Cf. Bradford v. Johnson*, 354 F.Supp. 1331, 1336-37 (E.D.Mich.1972), *aff'd per curiam*, 476 F.2d 66 (6th Cir. 1973) (admission of in-court testimony violated defendant's Fifth Amendment rights where witness was tortured by government and testified under threat of future torture). Furthermore, given that Wrentz's direct testimony was corroborated in various aspects by other evidence, it does not even appear that Wrentz's direct testimony is necessarily unreliable.

Even assuming, however, that the reliability of Wrentz's direct testimony and Marshall's out-of-court statements was somewhat suspect, the defendant had adequate tools in hand to challenge their reliability before the jury. The defense had full knowledge of the nature of Wrentz's and Marshall's interrogation, had access to the tapes and transcripts of the interrogation sessions prior to trial, and had a full opportunity to use those materials in examining both witnesses. Furthermore, in addition to a full opportunity to cross-examine both witnesses, Wilcox

had adequate opportunity to put on independent evidence to discredit the challenged testimony and did in fact put on such evidence. Finally, the trial court gave the appropriate jury charges on reasonable doubt, credibility, and immunity to aid them in assessing the value of the evidence in question. Considering all of these factors, we conclude that Wilcox did receive a fundamentally fair trial in spite of any government misconduct that might have occurred.

Trial Court's Failure to Strike Two Jurors For Cause

[9] Wilcox also asserts on cross-appeal that the trial court erred in refusing to strike two jurors for cause after they indicated in voir dire that they had preconceived notions about the defendant's guilt.[17] Both jurors, Finland and Nutt, were essentially in the same position: one admitted that she had an "inclination" as to the defendant's guilt and the other stated that she had "formed an opinion" as to the defendant's guilt.[18] Upon further questioning by the trial judge, however, both jurors stated that they would be able to decide the case solely on the basis of the evidence presented in court and the law as given by the judge. Both also stated that they would be able to disregard their previous inclinations and knew of no reason why they could not be fair and impartial jurors. The trial court then refused to strike either juror for cause. We hold that the district court did not err in dismissing Wilcox's challenge to the trial court's refusal as meritless.

[10] In *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct.

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[17] We undertake plenary review of this issue, with deference to the state court findings of fact as to the impartiality of the jurors. *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed. 847 (1984)

[18] Wilcox eventually struck both jurors with peremptory challenges, so neither ended up sitting on the jury.

2885, 2891, 81 L.Ed.2d 847 (1984), the Supreme Court held that the question of whether a particular juror has opinions which disqualify him is a question of historical fact to be resolved by the state courts. The trial court's resolution of this question of fact is entitled to special deference. *Id.* at 1038, 104 S.Ct. at 2892. The question of fact should be resolved, the Court said, by asking whether the juror swore he could set aside any opinion he might hold and decide the case solely on the evidence, and whether the juror's protestation of impartiality was believable. *Id.* at 1036, 104 S.Ct. at 2891. The question for this court is "whether there is fair support in the record for the state court's conclusion that the jurors here would be impartial." *Id.* at 1038, 104 S.Ct. at 2892.

In this case, the Georgia Supreme Court considered appellee's claim and concluded that it was meritless. The court stated that, in light of the jurors' repeated statements that they felt able to decide the case solely on the evidence presented in court, "we cannot conclude from the record that [their] opinion[s] . . .[were] so fixed that [they] would not follow the instructions of the trial court." *Wilcox v. State, supra,* 301 S.E.2d at 261. After a review of the record, we find that the voir dire of both jurors provides "fair support" for the state court's conclusion that the jurors were impartial, and therefore defer to that conclusion.

Limitation of Questioning
During Voir Dire

Wilcox's final argument on cross-appeal is his claim that the trial court denied his Sixth and Fourteenth Amendment rights by refusing to allow him to ask two potential jury members whether their preconceived learnings were towards innocence or guilt. Both jurors, Swank and Parrish, admitted during voir dire that they had a leaning in one direction or another. Immediately after making those statements, however, they both said that

they would be able to disregard the leaning and decide the case solely on the evidence. The trial judge then refused to let the defendant ask them which way they were leaning. Appellee now claims that the trial judge's refusal to let him ask that question violated his constitutional rights.[19] The district court also dismissed this claim as meritless.

[11-13] We agree with the district court. Under both federal and state law, a trial judge is accorded wide discretion in ascertaining what questions can and cannot be asked on voir dire. *See Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981); *Waters v. State*, 248 Ga. 355, 283 S.E.2d 238 (1981), *cert. denied*, 463 U.S. 1213, 103 S.Ct. 36, 77 L.Ed.2d 1455 (1983). The purpose of a voir dire is to ascertain whether a potential juror can render a verdict solely on the basis of the evidence presented and the charge of the trial court. *See Coleman v. Zant*, 708 F.2d 541, 547 (11th Cir.1983). The trial court's voir dire of both jurors achieved this purpose in a satisfactory manner. Both jurors stated that they could disregard their preconceived leanings, regardless of the direction, and render a verdict on the evidence presented at trial. There was no error here.

Bail

Appellant Ford also appeals the district court's order releasing Wilcox on bail.[20] The district judge ordered Wilcox released on bail after a finding that Wilcox had a likelihood of success on appeal. Appellant Ford argues that there must be a showing of exceptional circumstances before a petitioner in Wilcox's position can be released on

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[19] As with jurors Finland and Nutt, both of these jurors were struck with peremptory challenges and thus did not in fact sit on the jury.

[20] The standard of review here is whether the district court abused its discretion in granting bail. *United States v. Hurtado*, 779 F.2d 1467 (11th Cir.1985).

bail pending appeal. Since no demonstration of exceptional circumstances was made here, he argues that the district court's decision to release Wilcox on bail was error.

It is well established that a federal district court has the power to enter an order affecting the custody of a habeas petitioner who is properly before the court contesting the legality of his incarceration. *In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975); *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir.1974); *Mitchell v. Bell*, 458 F.Supp. 1044, 1049 (M.D.Ala.1978). At a minimum, it is clear that a habeas petitioner who has had a full trial and appeal stands in a very different position from a defendant who has not had a prior determination of his rights. *See Ostrer v. United States*, 584 F.2d 594, 599 (2d Cir.1978); *Glynn v. Donnelly*, 470 F.2d 95, 97 (1st Cir.1972). Not only has the petitioner lost the presumption of innocence, but the state has a greater interest in maintaining custody of the petitioner. *Glynn, supra*, 470 F.2d at 98.

[14] We need not reach the question of whether a finding of exceptional circumstances is required because our discussion of the merits should make it plain that the district court's finding of likelihood of success on appeal was in error. We reverse the district court's determination to release the petitioner on bail.

The district court's orders of December 20, 1985, granting the writ of habeas corpus and December 30, 1985, granting the appellee's motion for bail are reversed and vacated.

This case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX

(Partial Summary of the Facts. Additional Facts will be set forth in the court's discussion of the issues.)

On August 31, 1972, a Thursday, thirty-five year old Hellen Hanks disappeared. At the time of her disappearance, Hanks was working as a bookkeeper and secretary for Wilcox Outdoor Advertising Company in Valdosta, Georgia. Appellee E.K. Wilcox, Jr., and his father, E.K. Wilcox, Sr., own Wilcox Advertising Company.

Witnesses at trial testified that Hellen went to work the morning of the 31st in her usual manner. She was wearing a green dress with a long strand of green beads. After work she planned to have her hairpiece combed and her typewriter repaired. She was last seen at about 8:15 a.m. in the Wilcox Outdoor Advertising offices.

At about 5:00 p.m. that afternoon, Hellen's husband, James Hanks, received a phone call from E.K. Wilcox, Jr. Wilcox told Hanks that he could not find Hellen around the office, although her car was still there. Hanks immediately drove to the Wilcox offices, arriving there at around 5:20 or 5:25 p.m. Wilcox also called the Valdosta police and the Georgia Bureau of Investigation (GBI). They arrived at the Wilcox business at approximately 5:30 p.m. and began searching the Wilcox Advertising office and warehouse. They did not find Hellen, but they did find her typewriter and hairpiece in the car and two completed applications for employment in her purse.

The Valdosta police and GBI both continued their investigations of Hellen's disappearance for several days. Both investigations were eventually discontinued for lack of evidence.

On November 24, 1980, over eight years after Hellen Hanks disappeared, a logger plowing up a wooded area outside of Valdosta uncovered a wooden box. The plow ripped off the top of the box, exposing a skeleton. The logger immediately called the police. As the police arrived and began to search the box and the area immediately around it, they uncovered the following items: a metal cash box, a second metal box, a bank bag, receipt books, a

padlock with a key inserted, several other keys, portions of a dress, a wedding ring, a string of beads, lingerie, shoes, a mass of hair, and a length of rope. While the shoes were found inside the box, the other articles of clothing were found underneath the box. Some of the papers found with the box referred to the Wilcox Outdoor Advertising Company.

The burial box, the remains, and the other items found at the burial site were collected and examined by forensic experts. Dr. Robert Johnson, a dentist, compared the skull to Hellen's dental records and established that the skull belonged to Hellen.

In addition, many of the personal belongings found at the burial site, such as the dress, the wedding ring, and the beads, were identified as belonging to Hellen. Both the dress and the bra showed signs of being torn or cut.

Dr. Larry Howard of the Georgia State Crime Lab conducted two examinations of the skeletal remains. He concluded the first examination around March 10, 1981, shortly after the box was found. He testified that he was not able to establish the cause of death, but that he was nevertheless of the opinion that she was strangled. He based his opinion on knowledge of the conditions of the burial site and on other items found in and around the burial box, particularly the rope. The rope was found tangled in the hair and lying in the chest or neck area of the skeleton. He further testified that the rope had the approximate diameter of a neck when allowed to assume its own shape.

Dr. James Howard of the State Crime Laboratory testified that hairs, consistent with hairs taken from the mass of hair found in the box, were imbedded in the surface of the rope. He testified that such a condition would not exist from casual contact. He further testified that the combination of the condition of the rope, the condition of the hair, and the hair's adherence to the rope were consis-

tent with the hair being imbedded in the rope while the victim was still alive. He also testified that the curl or loop in the rope indicated that it had been crossed or tied and left that way for a long period of time.

Dr. Larry Howard's second examination of the remains occurred in August 1981.[21] Dr. Howard testified that his second examination revealed certain abrasions and staining in the area of the left knee cap which indicated that the left leg had been dismembered below the knee prior to the first burial. Dr. Ellis Kerley, a forensic pathologist from the University of Maryland, also examined the remains. He testified that, while he could not be positive of dismemberment, the abrasions on the bones were consistent with dismemberment shortly after death.

Dr. Joseph Burton offered a contrary opinion. He testified that the state of oxidation or mineralization of the abrasions indicated that the marks were a recent injury to the bones. He also testified that he did not think the abrasions were consistent with dismemberment of the leg.

Several witnesses testified that the burial box was similar to boxes used by Wilcox Advertising to carry equipment on the back of trucks. Wilcox, Jr., told several police officers that the burial box looked like a box that had been reported missing from the business in 1972. Willard King, who worked for the Wilcox business part-time on Saturdays in 1972, testified that he found one of these boxes missing the second Saturday after Hellen's disappearance. He had not worked the Saturday immediately following her disappearance.

Other items found at the burial site were also connected to the Wilcox business. One of the keys found in

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[21] The second examination of the remains took place after the interrogation of two Wilcox Advertising Company employees, Lorenzo Marshall and Ed Wrentz, discussed *infra*, revealed the possibility that the body may have been partially dismembered.

the box was an ignition key to Wilcox, Jr.'s pick-up truck which was kept by Hellen while she was the business's secretary. The cashbox and the rusted padlock with the key were both linked to the Wilcox business.

The police began an investigation into the murder of Hellen Hanks. The most significant evidence turned up in the course of the investigation were statements taken during the interrogations of two long-time employees of Wilcox Outdoor Advertising Company, Lorenzo Marshall and Ed Wrentz. These statements are also of central significance in this appeal.

Ed Wrentz, an elderly black man who had worked for the Wilcox business for more than thirty years, gave a signed statement on July 1, 1981, which implicated Wilcox, Jr., in Hellen's death. Wrentz was seventy-eight at the time of trial and could not read or write. The statement said that he and Lorenzo Marshall had helped Wilcox, Jr., and Wilcox, Sr., load Hellen Hanks' stiffened corpse into a box at the Wilcox warehouse and that they had dug a hole the night of Hellen's disappearance and buried her.

At trial on direct examination Wrentz gave testimony basically consistent with his July 1, 1980, statement. He testified that Wilcox, Jr., had driven him and Lorenzo Marshall into the country to dig a hole, but that they did not finish because it began to rain. He did not remember the date or time, but testified that it was dark, although it had not been dark long. He also testified that at some later date, he and Lorenzo Marshall met Wilcox, Jr., and his father at the Wilcox business warehouse, placed Hellen Hanks' body into a box, and loaded the box onto a truck. He further testified that the body was stiff and that extra pieces, which he thought might be part of her legs, were also put into the box. He said that they drove to the hole and finished digging it, and then placed the box along with a few other items into the hole.

On cross-examination Wrentz contradicted the tes-

timony he had given on direct examination. He stated that he had told the police the first time he talked to them that he did not know anything about Hellen Hanks' disappearance and that he had been out of town from Thursday, August 31, through Saturday, September 2. He also testified, however, that he did get a box from the warehouse and that he did dig a hole. On redirect, Wrentz repeated the testimony he gave on direct examination. He stated that he and Lorenzo had placed Hellen Hanks' body in a medium-sized box, driven somewhere in a pick-up truck, dug a hole, and buried the box.

Other witnesses at trial corroborated some of Wrentz's direct and re-direct testimony on various details pertaining to the disposal of the victim's body. Drs. Howard and Kerley gave testimony supporting Wrentz's observation that the victim's legs had been dismembered, and other witnesses corroborated Wrentz's description of the burial site. In addition, there was evidence introduced to establish that it was indeed raining in Lowndes County on the night of Hellen Hanks' disappearance.

Lorenzo Marshall, another elderly black Wilcox Advertising employee with a limited education, also gave a signed statement to the police basically corroborating Wrentz's statement and direct testimony at trial. At trial, however, he recanted his statement. He testified that he was in Albany, Georgia, from Tuesday, August 20, through Friday, September 1, in 1972 and that he had nothing to do with the burial. Two other employees of Wilcox advertising testified that they had been in Albany working with Marshall the week of Hanks' disappearance. Marshall's prior statement was brought in to impeach his testimony. He explained that he had tried to tell the officers that he did not know anything about the disappearance, but that the officers put words in his mouth by telling him what Ed Wrentz had said. He testified that he only went along with the story because he was scared and wanted to go home.

E.K. Wilcox, Jr., testified that he and his father left Atlanta on the morning of August 31 to return to Valdosta. He testified that he and Wilcox, Sr., had stopped in Cordele, Georgia, to visit his father-in-law, Willard King. They stayed approximately an hour. He further testified that upon arriving in Valdosta they both went home to get their own cars and then drove separately to the office. He testified that they arrived at the office at around 4:14 to 4:30 p.m.

Wilcox further testified that they discovered that Hellen was missing as soon as they arrived. They looked for her but were unable to find her. He then called Hellen's husband at about 4:45 to inquire about her whereabouts and called the police shortly thereafter. Wilcox, Sr., testified to the same essential facts concerning the time of their arrival and the circumstances following it.

Wilcox, Jr., testified that he did not go home until approximately 8:00 p.m., when the police search ended. He then drove home and washed up and met his wife at a party honoring him and his wife. He arrived at the party between 8:30 and 9:00 p.m. He also testified that after the party was over he went back to the office to make sure the doors were locked and arrived home at 11:15.

The Wilcoxes' testimony was contradicted on some points at trial. Two police officers testified that the search ended at around 6:30 p.m. There was also some testimony that Wilcox, Sr.'s car was not parked outside the office during the search, although Wilcox, Sr., had testified that he had driven it into work. Wilcox, Jr.'s ex-wife contradicted his testimony as to their time of arrival at the office. She testified that he had called her at around 5:00 to tell her that Hellen Hanks was missing. During the course of the conversation he told her that he and his father had arrived at the office at around 3:00 or 3:30. Wilcox's father-in-law also contradicted the Wilcoxes' testimony as to their time of departure from Cordele. He stated that the Wilcox father

and son had left his home at approximately 1:30. Wilcox's wife testified that the drive from Cordele to Valdosta took 60-70 minutes, while his father-in-law testified that the drive took an hour and a half.

Wilcox's ex-wife testified that Wilcox, Jr., and Wilcox, Sr., did not arrive at the party until 9:00 p.m. She also testified that after the party ended at 10:30, Wilcox did not return home with her but instead told her he needed to go back by the business to make sure that everything was locked up. She futher testified that he had not returned home by the time she went to sleep at 11:00, but that he was there when she awoke the next morning.

Several witnesses testified to strained relations between Wilcox, Jr., and Hellen Hanks. Several of Hellen's friends testified that she had confided in them shortly before her disappearance that she was afraid of the younger Wilcox and that he had made sexual advances towards her. She also told a few friends that she was so afraid of Wilcox that she was looking for another job. One employee of Wilcox Advertising testified that he saw Wilcox place his hands on Hellen's buttocks and saw her push him away, while another employee testified that he saw the two bump into each other in a doorway and "appear disturbed".

Wilcox denied that he had ever touched or patted Hellen. He also testified that, although he had been irritated with her on one occasion, she was a good employee with whom he never had any difficulty.

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UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

U.S. COURT OF APPE
ELEVENTH CIRCU
FILED
MAY 11, 1985
MIGUEL J. CORTE
CLERK

No. 86-8060

E.K. WILCOX, Jr.,
Petitioner-Appellee,
Cross-Appellant,

v.

J. PAUL FORD, Warden,
Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 3, 11 Cir., 1987, ___ F.2d ___).

(May 11, 1987)

Before FAY and JOHNSON, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor

of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is Denied.

ENTERED FOR THE COURT:

FRANK M. JOHNSON

UNITED STATES CIRCUIT JUDGE

REHG-6
(6/82)

UNITED STATES COURT OF APPEALS

For the Eleventh Circuit

No. 86-8060

D.C. Docket No. 84-78

E.K. WILCOX, Jr.,
Petitioner-Appellee,
Cross-Appellant,

v.

J. PAUL FORD, Warden,
Respondent-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

Before FAY and JOHNSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby, AFFIRMED in part and VACATED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: April 3, 1987
For the Court: Miguel J. Cortez, Clerk
By: _____
Deputy Clerk

ISSUED AS MANDATE: May 19, 1987

E.K. WILCOX, Jr., Petitioner,

v.

J. Paul FORD, Warden, Respondent.

Civ. A. No. 84-78-VAL.

United States District Court,
M.D. Georgia,
Valdosta Division.

Dec. 20, 1985.

State prisoner, whose murder and concealing death conviction was confirmed by the Georgia Supreme Court, 250 Ga. 745, 301 S.E.2d 251, sought writ of habeas corpus. The District Court, Owens, Chief Judge, held that: (1) evidence was insufficient to support finding beyond reasonable doubt that defendant committed offenses of murder and concealing death or was aider and abetter; (2) police misconduct in interrogating witness was so egregious as to violate due process; and (3) even if evidence was sufficient to support conviction, police interrogation was so egregious as to warrant new trial.

Application for writ of habeas corpus granted.

1. Homicide 7

Critical elements of offense of murder under Georgia law are unlawfully causing death of another human being with malice aforethought.

2. Criminal Law 75

Critical elements of offense of concealing death under Georgia law are concealing death of another which results in hindering discovery of whether that person was unlawfully killed.

3. Homicide 250

Under Georgia law, defendant's conviction could not stand, where defendant's conviction for murder rested upon circumstantial evidence, and based on same evidence jury

could have relied upon to convict defendant, jury could also have found that murder was committed by defendant's father, and there was no evidence in record to establish that if father committed crime, defendant had aided and abetted him.

4. Homicide 250

Evidence was insufficient to support finding defendant was guilty of murder beyond reasonable doubt; convictions for murder and concealing death rested almost entirely on testimony of witness whose testimony was internally inconsistent in that he recanted entire story on cross-examination and testimony of witness who could have corroborated key witness' testimony denied story related by key witness.

5. Criminal Law 36.5

Outrageous governmental conduct is legal defense in criminal case.

6. Constitutional Law 265

Indictment should be dismissed only when law enforcement conduct violates fundamental fairness, shocking to universal sense of justice, mandated by due process clause of Fifth Amendment. U.S.C.A. Const.Amend. 5.

7. Constitutional Law 257.5

Police misconduct was so egregious to shock conscience and violate due process, where police officers threatened and intimidated witnesses, even two elderly witnesses with limited education. U.S.C.A. Const.Amend. 14.

8. Criminal Law 700 (1)

Police misconduct in interrogating witness was not so egregious as to require dismissal of murder indictment, but did rise to level warranting new trial in which entire tape recordings of witness interrogations would be played to jury, where jurors could not have made informed, intelligent and fair decision on defendant's guilt or innocence without hearing tape recordings in their entirety.

9. Criminal Law 700 (2)

Prosecutor, as officer of court, has duty to ensure that jury has complete and accurate information concerning defendant in criminal case.

10. Criminal Law 700 (1)

Although prosecutor does not have duty to assist defense in presenting case, prosecutor does have duty to see that evidence is fairly presented to jury.

11. Criminal Law 330

Defendant in criminal case is not required to produce any evidence in his defense; thus, fact that tape recordings and transcripts showing egregious witness intimidation by police were made available to defendant's attorneys at or before trial did not place upon defendant responsibility for ensuring that jurors heard tape recordings and saw transcripts.

James Wyatt, Bobby Lee Cook, Summerville, Ga., for petitioner.

Mary Beth Westmoreland, Atlanta, Ga., for respondent.

OWENS, Chief Judge:

Federal law provides that "a district court *shall* entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1977) (emphasis added). Pursuant to this law, E.K. Wilcox, Jr. has filed a petition for a writ of habeas corpus contending that in violation of his rights derived from the United States Constitution he was convicted of murder and concealing a death. This court is required to determine whether or not the State of Georgia unconstitutionally convicted and imprisoned petitioner Wilcox.

On January 14, 1982, petitioner was convicted by a jury in the Lowndes County Superior Court for murdering and then concealing the death of Hellen Hanks. These convictions were affirmed on direct appeal. *Wilcox v. State*, 250 Ga. 745, 301 S.E.2d 251 (1983). Petitioner has sought and been denied relief in a state habeas action by an order dated November 17, 1983, from the Superior Court of Muscogee County. The Supreme Court of Georgia declined to review this decision by denying petitioner's application for a certificate of probable cause to appeal on April 25, 1984. The respondent has stipulated that petitioner has exhausted his state remedies on all issues raised. Thus, this action is in a posture to be considered on the merits.

Paraphrasing this court's instructions to criminal juries, it is important to remember that this is an important case. The fact that any person convicted of a crime has the right to have his conviction reviewed to determine whether he received a fair trial under the Constitution, is of supreme and profound significance in the life of our nation and in the life of each one of us individually.

Whenever true justice is done all of us grow in strength and in spirit and whenever any violence is done to the administration of justice or injustice is dealt to any person, we are all, to that extent, weakened. The court's important function today is to determine justice under the law in this particular case and thereby to sustain the validity of the ideal of justice under the law for all.

I. Sufficiency of the Evidence Standard

In his opening statement to the jury the prosecuting attorney said that the state had no evidence to prove 'the cause of Hellen Hanks' death. (Trial transcript at 7). As promised, the state produced no such evidence at trial. In spite of that lack of evidence, the jury found petitioner guilty of murder and of concealing a death.

One allegation of error made by petitioner is that the evidence adduced at trial is insufficient to support his convictions under the standards set forth by the Supreme

Court of the United States in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Specifically, petitioner asserts that the state failed to prove that Hellen Hanks' death was the result of criminal agency and that the evidence was wholly insufficient to show that petitioner committed the murder.

This issue was addressed by the Georgia Supreme Court on direct appeal, *Wilcox v. State*, 250 Ga. 745, 752-53, 301 S.E.2d 251, 257-58 (1983). The state court's factual findings are entitled to a presumption of correctness. 28 U.S.C.A. § 2254(d) (West 1977); *Sumner v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). However, this court too has its responsibility. Application of the *Jackson* standard is a mixed question of law and fact and is thus not entitled to the § 2254(d) presumption. *See Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir.1982). "A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts.... But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law." *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979). Petitioner's claim has been properly presented and is therefore entitled to review. *See generally Brown v. Wainwright*, 772 F.2d 780 (11th Cir.1985).

The United States Constitution guarantees that no person shall be subjected to a criminal conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the Supreme Court developed a test designed to determine whether the record evidence adduced at trial could reasonably support a finding of guilt beyond a reasonable doubt. The question to be answered in reviewing the evidence is, "whether, after viewing the evidence in the light most favorable to

the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789. The *Jackson* court, however, remained cognizant of the significance of the role played by the trier of fact. Findings of the trier of fact are to be given broad deference subject only to the review necessary to guarantee the fundamental protection of due process of law. *Id.*

It is this review that the petitioner seeks to have this court undertake. Petitioner alleges that based upon the evidence produced at his trial, no rational trier of fact could have found all the essential elements of the offenses for which he was convicted beyond a reasonable doubt. It thus becomes incumbent upon this court to determine whether the evidence produced at petitioner's trial satisfies the test of *Jackson v. Virginia* as to all the necessary elements of the offenses for which petitioner was convicted. *Id.*

[1,2] A jury convicted the petitioner of murder and of concealing the death of another person. Georgia defines murder as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

O.C.G.A. § 16-5-1(a), (b) (1981). The critical elements of the offense of murder therefore are (1) unlawfully (2) causing the death of another human being (3) with malice aforethought. *See Holloway v. McElroy*, 474 F.Supp. 1363 (M.D.Ga.1979), *aff'd*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398

(1981). Likewise, the Georgia code provides "[a] person who, by concealing the death of any other person, hinders a discovery of whether or not such person was unlawfully killed is guilty of a misdemeanor." O.C.G.A. § 16-10-31 (1981). The critical elements of the offense of concealing a death therefore are (1) concealing the death of another (2) which results in hindering the discovery of whether or not that person was unlawfully killed. *Id.*

This court must now review the evidence to determine whether it was sufficient for any rational trier of fact to find that petitioner committed each of the above elements beyond a reasonable doubt. This evidence must be viewed in a light most favorable to the prosecution.

II. The Evidence

The Georgia Supreme Court from the evidence found the facts to be as follows:

"On August 31, 1972, a Thursday, the victim, thirty-five year-old Hellen Hanks, disappeared. At that time, she was working as a bookkeeper and secretary for Wilcox Outdoor Advertising in Valdosta, a company owned by the appellant, E.K. Wilcox, Jr. and his father, E.K. Wilcox, Sr. Her body was discovered approximately eight years later, on November 24, 1980, by a logger clearing a wooded area.

On August 31, 1972, Hellen went to work as usual. She was wearing a dark green dress with a long strand of green beads. After work, she planned to have her hairpiece combed and her typewriter repaired. Jerry Davis, an employee of Wilcox Outdoor Advertising, testified that he saw her in the office at about 8:15 a.m. before he left on an assignment.

At about 5:00 p.m. that afternoon, James Hanks, the victim's husband, received a telephone call from the appellant. Hanks testified that the appellant told him that Hellen could not be found around the office, although her car was still there. Mr. Hanks then immediately drove to the Wilcox Outdoor Advertising office, arriving there at about 5:20 p.m. or 5:25 p.m. He testified that when he ar-

rived, the appellant was going through Hellen's purse. He asked the appellant what he was doing, and he responded he was looking for some keys that Hellen would 'not be needing . . . any longer.'

At approximately 5:30 p.m. the Valdosta police and GBI agents, responding to the appellant's call, arrived at the Wilcox business. They unsuccessfully searched the office and warehouse for Hellen, but they did find her typewriter and hairpiece in the car and two completed applications for employment in her purse. Since they found no evidence indicating where Hellen might be, a missing person's report was filed.

The Valdosta police continued their investigation of Hellen's disappearance for several days before discontinuing it because neither Hellen nor any new evidence was found. Similarly, though the GBI investigation lasted longer, it was discontinued for lack of evidence.

On November 24, 1980, Fred Blanton, a logger, was digging up roots with a plow while clearing a wooded area off Indian Creek Road when he unearthed a wooden box. The plow ripped off the top of the box, which had been nailed shut, exposing a skeleton. Mr. Blanton called the police to the scene. In addition to the skeleton, the following items were found in or around the box: a metal cash box, a second metal box, a bank bag, receipt books, a padlock with a key inserted, several other keys, portions of a dress, a wedding ring, lingerie, shoes, a mass of hair, and a length of rope. The dress, the padlock, and the other keys were found under the burial box, and the lingerie was found rolled up in a ball next to it.

Because papers found referred to Wilcox Outdoor Advertising, an officer called the appellant to inquire if he was missing certain items. As a result of the call, but not at the request of the officer, the appellant came to the scene.

The burial box, the skeletal remains, and other items found at the scene were collected and examined. Dr. James

Howard of the State Crime Laboratory examined the rope and testified that hairs, consistent with hairs taken from the mass of hair found in the box, were embedded in the surface of the rope, a condition, he testified, that would not exist as a result of casual contact. He testified that the combination of the condition of the hair and its adherence to the rope was consistent with it having been embedded in the rope while the victim was alive. He testified that the curl or loop in the rope was consistent with it having been crossed or tied and left that way for a long period of time. Although witnesses testified that the rope found in the grave was similar to rope used at Wilcox Outdoor Advertising, Dr. Howard testified that he had compared rope samples taken from the Wilcox business in 1980 to the rope found in the grave, and they did not match. He attributed the difference to the use of different rope fibers in 1972.

Several witnesses testified that the burial box was similar to boxes used by Wilcox Outdoor Advertising, and the appellant, while at the burial site, told several officers the box used to bury Mrs. Hanks looked like one that had been reported missing from the business in 1972. These boxes are approximately four feet long, two to three feet wide, and two to three feet deep and are made of wood, except for the top which is metal. In 1972, two trucks used at Wilcox Outdoor Advertising were fitted with these boxes to carry equipment. A third box of this type was kept in the back of the warehouse. Willard King, the appellant's father-in-law, and now production manager of the Wilcox business, worked part-time on Saturdays in 1972. He testified that he found this extra box was missing on the second Saturday, or nine days, after Hellen's disappearance. He had not worked the previous Saturday. He stated that he told the appellant the box was missing, and that the appellant said he would report it to the police, since Mrs. Hanks was also missing.

Other items found at the scene were also connected to the appellant's business. One of the keys fit a 1971 Ford

pick-up truck, which was being driven by the appellant in 1972. There was testimony that there were two keys for this truck, one kept by the appellant, and one kept by Hellen Hanks while she was the secretary. In 1979, this truck was purchased from the appellant by Salem Scott, who testified the appellant gave him only one ignition key.

The cash box and the rusted padlock with the key in it were linked with the Wilcox business. To service its vehicles, the company had a gas pump located behind the building. The switch for this pump was located inside the office and was secured with a padlock. There was testimony that Hellen Hanks kept the key to this padlock in the cash box in her office. If employees wished to use the pump, they had to get the key from Hellen. The key found in the padlock opened it, and a key taken from the appellant's desk drawer one week after the burial site was uncovered also fit the rusted padlock.

Many of the personal belongings found at the burial site, such as the dress, the wedding ring, and the beads, were identified by Hellen's family as belonging to her. Both the dress and the bra showed signs of being torn or cut.

Medical studies and comparisons were conducted on the skull and other skeletal remains. Dr. Robert Johnson, a dentist, compared the skull to Hellen's dental records, and established the skull to be Hellen's. Dr. Larry Howard of the Georgia State Crime Lab conducted two examinations of the skeletal remains, one shortly after the bones were found, and another in August of 1981.

Dr. Howard concluded the first examination of the skeletal remains about March 10, 1981. He testified that he was not able to establish the cause of death, but that, nevertheless, he was of the opinion that she was strangled. He based this opinion on his knowledge of the conditions of the burial site and on other items found at the burial site, particularly the rope, which was found tangled in hair and lying in the chest or neck area of the skeleton, and which,

he testified, had the approximate diameter of a neck when allowed to assume its own shape.

After statements taken from two employees of Wilcox Outdoor Advertising in July of 1981 indicated that the body may have been dismembered before burial, the remains were exhumed, and a second examination was performed. It revealed evidence of dismemberment of the left knee joint. Dr. Howard testified that after cleaning the knee joints, he found two linear or vertical, as opposed to horizontal, abrasions on the back of the left knee cap. He testified the abrasions were made by a pointed instrument, and that brown bodily fluid stains on the knee cap and the lack of abrasions in the dirt covering the knee cap indicated that the dismemberment occurred prior to the first burial. He also found a possible associated lesion or slice mark on the bottom of the large thigh bone (the femur) of the left leg, located on the same side of the leg as the abrasions on the knee cap.

The left knee cap and the femur were also examined by Dr. Ellis Kerley, a leading forensic pathologist from the University of Maryland. He agreed that there were two incised marks on the back of the left knee cap and one on the femur. Though he could not be positive of dismemberment in this case, he found these cut marks to be consistent with dismemberment shortly after death.

Contrary testimony was offered by Dr. Joseph Burton. He testified that the bone exposed by the cut marks on the knee cap and femur was not mineralized or oxidized, as was other unmarked bone, indicating that these marks were a recent injury to these bones. He did not think that these marks were consistent with dismemberment of the leg.

After the discovery of the remains of Hellen Hanks, an investigation of her murder began. The police interrogated two employees of Wilcox Outdoor Advertising, Lorenzo Marshall and Ed Wrentz, who gave statements incriminating the appellant.

Lorenzo Marshall, who started work for the Wilcox business in 1952, gave a signed written statement on July 2, 1981, which was witnessed by Ed Wrentz. He stated that he did not remember the date, but that shortly after Mrs. Hanks disappeared, Ed Wrentz came to him and asked him to help him dig a hole. He stated that the appellate then drove them in his truck somewhere, where they dug until they had to stop because of rain, at which time the hole was about waist deep. He stated that he did not remember when, but that he and Ed Wrentz later met the appellant and his father at Wilcox Outdoor Advertising, at which time the appellant had them load a box on his truck and drove them to the hole, where he and Ed finished digging and buried the box. He also stated that Ed threw something that looked like a dress into the hole before the box was lowered.

At trial, Marshall recanted his story, maintaining that he was in Albany, Ga. from Tuesday until Friday, September 1, 1972, and that he had nothing to do with a burial. Two other witnesses, both employees of Wilcox Outdoor Advertising, testified to this effect. Both testified that they were in Albany working with Marshall during the week of Hellen's disappearance, and that they did not arrive in Valdosta until that Friday afternoon. Marshall testified that he told the officers from the very beginning he didn't know anything about a burial. He testified that the officers put words in his mouth by telling him what Ed had said. He testified that since he was scared and wanted to go home, he went along with the story.

Ed Wrentz, who was seventy-eight at the time of trial

and who had worked for the Wilcox business for more than thirty years, gave a signed statement on July 1, 1981 incriminating the appellant. Unlike Marshall, he recounted basically the same story on direct examination at trial. He testified that shortly after Mrs. Hanks disappeared, he and Lorenzo Marshall were driven into the county by the appellant to dig a hole, but that they did not finish because of rain. He testified that he didn't remember the date, but that it was dark, though it hadn't been dark long. He testified that at a later date, he and Lorenzo met the appellant and his father at the warehouse, at which time he and Lorenzo put Mrs. Hank's body into a box and loaded it onto a truck. He testified that the body was stiff and that extra pieces, which he thought were part of her legs, were also put in the box. He testified that they then drove to the hole, at which time he and Lorenzo finished digging the hole and placed the box, along with few other things, into it.

After testifying to the above story on direct, Wrentz repudiated it on cross. He stated that the first time he talked to the police, he told them he didn't know anything about Mrs. Hanks's disappearance. He testified he told the truth on that occasion and that that was the truth now, i.e., at the time of trial. He testified on cross that he was out-of-town Thursday, August 31, 1972 and Friday, September 1, 1972, but arrived back in Valdosta that Saturday. This testimony contradicted the statement he gave to police, which was that he and Lorenzo helped dig a hole the night of Hellen's disappearance. Mr. Wrentz, however, did testify on cross that he did get a box from the warehouse and that he did dig a hole.

On redirect, Mr. Wrentz reiterated that he and Lorenzo put Mrs. Hanks's body in a medium sized box, were driven somewhere in a Ford pick-up truck, dug a hole, and buried the box. Also, his description of the burial site before its clearance by Fred Blanton was consistent with that of other witnesses. He described a gravel road, off of

which was a three-path-road surrounded by woods, which ran past the burial site.

Concerning his activities on August 31, 1972, the appellant gave a statement to the police in October of 1972 and testified at trial. It is undisputed that the appellant and his father left Atlanta on the morning of August 31, 1972 to return to Valdosta. They had been there since Tuesday, August 29, 1972 on a business trip. The crucial issues concern his time of arrival in Valdosta and his activities once there.

In October of 1972, the appellant talked with GBI agent Larry Oxford. He stated that while driving back to Valdosta on August 31, 1972, he and his father stopped around 1:00 p.m. to visit a couple of friends, Willard King and Howard Holt, in Cordele. He stated that they left Cordele and arrived at his father's home in Valdosta around 3:45 p.m. From there, they drove separate cars to the office and arrived there around 4:00 p.m. He stated that Hellen was not there when they arrived, although her car and purse were, and since he and his father could not find her, they called Mr. Hanks and the police around 5:00 p.m.

At trial, the appellant recounted basically the same story. He testified that on their return from Atlanta, he and his father stopped in Cordele about 1:00 p.m. to visit his father-in-law, Willard King, stayed there approximately an hour, and then left for Valdosta. They got off of I-75 at their Valdosta exit around 4:00 p.m., give or take a few minutes. From there, he testified they went to the family home so he could pick up his car. They drove separate cars to the office, arriving between 4:15 p.m. and 4:30 p.m. He testified that Hellen was not there when they arrived and they looked for but were unable to locate her. As a result, he testified, he called Mr. Hanks about 4:45 p.m. to inquire about Hellen and called the police shortly thereafter. He testified that he did not notice if Hellen's

purse was at the office, and he denied looking through it, though he did state that either he or his father asked Mr. Hanks to look in her purse to see if her office keys were in it. He testified that Mr. Hanks found them and handed them to him. He denied making the statement that she wouldn't be needing the keys anymore. The appellant's father testified to basically the same facts concerning the time of their arrival and the circumstance following it.

The appellant claimed that at the time of the initial search for Hellen by Mr. Hanks and the police, the entire office was available to be searched. Both the appellant and his father testified that Wilcox, Sr. was at the office during the search. The appellant testified that the search lasted until around 8:00 p.m., at which time he left the office, went home and washed up, and drove to a dinner honoring him and his wife, arriving there between 8:30 p.m. and 9:00 p.m. After the dinner, he testified that he first went back to the office to make sure the doors had been locked and then went home.

However, there was testimony contradicting some of the above assertions. First, Mr. Hanks and two police officers testified that the appellant's father was not at the office while they were there. Second, two police officers testified that the search ended about 6:30 p.m. In addition, there was testimony that only Mrs. Hanks's car, the appellant's car, a police car, and a truck were at the office on the afternoon of August 31, 1972, indicating that the appellant's father, who drove there in his own car, was not at the office.

The appellant's ex-wife and her father, Willard King, contradicted the appellant's and his father's testimony concerning their time of arrival in Valdosta on August 31, 1972. The appellant's ex-wife testified that the appellant called her shortly after five o'clock on August 31, 1972. She testified that he told her that he and his father had arrived at the office between 3:00 p.m. and 3:30 p.m., and had

found the door open, but couldn't find Mrs. Hanks. Willard King testified that on August 31, 1972, the appellant and his father stopped in Cordele to visit him at approximately 1:00 p.m. and left about 1:30 p.m. The apppellant's ex-wife testified that she and her husband had previously driven from Valdosta to Cordele several times in around 60 to 70 minutes (the speed limit at that time was seventy miles per hour). Mr. King testified the drive should take about one and one-half hours.

On the evening of August 31, 1972, a party honoring the appellant and his ex-wife was scheduled. The appellant's ex-wife testified that when she talked to the appellant shortly after 5:00 p.m., he told her to go to the party without him, because he wasn't sure what time Mr. Hanks and the police would leave the office. Both the appellant's ex-wife and her mother testified that the appellant and his father did not arrive at the party until 9:00 p.m. There was testimony that the police left the Wilcox business premises at about 6:30 p.m. The appellant's ex-wife also testified that after the party ended at 10:30 p.m., the appellant, instead of going home with her, told her that he needed to go back to the office to make sure everything was locked. She testified that though he was in bed the next morning when she awoke, he had not come home before she went to sleep around 11:00 p.m. and did not wake her when he did come home. The appellant testified that he arrived home about thirty to forty minutes after leaving the party.

Several witnesses testified to strained relations between the appellant and Hellen Hanks. Dorothy Edwards, Hellen's best friend, testified that the Sunday before Hellen disappeared Hellen told her she was afraid of the appellant and was looking for other employment. Dorothy testified that Hellen told her that she slapped the appellant one day because he grabbed her on the buttocks.

Another friend, Cara Ardrengo, testified that the Tuesday before Hellen disappeared Hellen spoke with her

and expressed fear of the appellant and a desire to get away from him by finding other employment. She was testified that Hellen told her that she was keeping two sets of books, one that was good, and one that wasn't good, and that she didn't like to be in that position.

Jerry Davis, an employee of Wilcox Outdoor Advertising at the time of Hellen's disappearance, testified that he saw the appellant and Hellen appear disturbed when they bumped into each other in a doorway, and another employee, John Goodman, testified that he saw the appellant place his hands on Hellen, who then pushed them away. He also said he heard appellant call Hellen a 'dumb bitch.'

Lucy Hanks, Hellen's daughter, also testified that Hellen wanted a new job because she did not like the appellant. Lucy testified that one day, several weeks before her mother's disappearance, her mother came home crying because she had slapped the appellant for making a pass at her.

The appellant denied that he had ever touched or patted Hellen and that she had ever slapped him. He testified that though he had been irritated with her on one occasion, she was a good employee with whom he never had any difficulty."

Wilcox, 250 Ga. at 745-52, 301 S.E.2d at 253-57.

III. Application of Georgia Evidentiary Rule

Based upon this evidence, the jury found the petitioner guilty of murdering Hellen Hanks and of concealing her death. This court must now determine whether this evidence is sufficient for any rational trier of fact to have found the essential elements of these offenses beyond a reasonable doubt. As discussed earlier, in making this determination, the evidence mustbe viewed in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560

(1979). Further, a *Jackson* review must include application of the convicting state's evidentiary rules. *See Moore v. Duckworth*, 443 U.S. 713, 714-15, 99 S.Ct. 3088, 3089-90, 61 L.Ed.2d 865 (1979) (per curiam); *Turner v. McKaskle*, 721 F.2d 999, 1003 (5th Cir.1983); *Harris v. Blackburn*, 646 F.2d 904, 906 (5th Cir.1981) (Unit A). Of particular significance to a review of the evidence in this case is O.C.G.A. § 24-4-6 (1982) Which provides: "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." Discussing this rule, the Georgia Supreme Court has said,

> if the state relies upon circumstantial evidence, that evidence must be so strong as to exclude every other reasonable hypothesis save that of the guilt of the accused. It must be inconsistent with his innocence. This court has ruled on several occasions that, in cases involving life or liberty, this rule must not be relaxed. When a heinous crime has been committed in a community, and the people are greatly shocked thereby, it is natural for them to catch at any little circumstance to throw suspicion upon some person, and to conclude from this or that circumstance that he is the guilty party. The horror of the crime, and their desire, as good citizens, to see the guilty party punished and the law vindicated, frequently lead them to premature judgment, which oftentimes follows them into the jury box, where, as jurymen, they not infrequently find persons guilty on bare suspicion alone.

Parks v. State, 202 Ga. 84, 93 42 S.E.2d 103, 109 (1947)(quoting *Williams v. State*, 113 Ga. 721, 723, 39 S.E. 487, 488 (1901)). *See also Barnett v. State*, 153 Ga.App. 430, 265 S.E.2d 348 (1980); *Kreager v. State*, 148 Ga.App. 548, 252 S.E.2d 1 (1978); *Roberson v. State*, 145 Ga.App. 687, 244 S.E.2d 629 (1978); *Carr v. State*, 119 Ga.App. 540, 167 S.E.2d 707 (1969). The former Fifth Circuit has indicated

that there may be due process implications in the application of O.C.G.A. § 24-4-6. *See Holloway v. McElroy*, 632 F.2d 605, 640 n. 55 (5th Cir.1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981).

[3] Since petitioner's conviction for murder rests upon circumstantial evidence, petitioner is entitled to the protection of O.C.G.A. § 24-4-6 (1982). Thus, the facts adduced at trial must exclude every other reasonable hypothesis. Based on the same evidence that the jury relied upon to convict the petitioner, a jury could have found that Ms. Hanks' fear stemmed from her belief that one set of books she kept for the Wilcox business was illegal and that this "bad" set of books was kept at the direction of the owner, E.K. Wilcox, Sr. A jury could have found that since Ms. Hanks had openly discussed her concern about the "bad" set of books she was asked to keep, Mr. Wilcox, Sr. was aware that she was disseminating this information. A jury could have further found that Mr. Wilcox, Sr. had the opportunity to strangle Ms. Hanks and then conceal her body between 3:30 p.m. and 5:00 p.m. on August 31, 1972. Likewise, a jury could have found that Mr. Wilcox, Sr. played a role equal to or greater then that of petitioner in disposing of Ms. Hanks' body as previously discussed by this court.

As is true concerning the proof against petitioner, there is no direct evidence linking Mr. Wilcox, Sr. to the act of strangling Hellen Hanks. Again, one may only reach this conclusion by making inferences of varying degrees of strength which are based upon wholly circumstantial evidence. This court finds that the inference against petitioner, that Ms. Hanks was strangled as a result of some sort of sexual confrontation, is no more compelling than the inference that may be drawn against E.K. Wilcox, Sr., that Ms. Hanks was strangled out of fear that she may disseminate information, true or not, regarding two sets of books kept by the Wilcox business.

Thus, this court concludes that the evidence produced at trial fails to exclude every other reasonable hypothesis except that of guilt of the petitioner for murder. *See* O.C.G.A. § 24-4-6 (1982). Indeed, the evidence may be construed so as to be consistent with petitioner's innocence. *See Parks v. State*, 202 Ga. 84, 42 S.E.2d 103 (1947). At a very minimum, an alternate *reasonable* hypothesis must constitute a *reasonable* doubt as to petitioner's guilt. In the present case, the hypothesis that petitioner's father committed the murder raises a reasonable doubt as to petitioner's guilt. Thus, this court must conclude that in the context of Georgia law, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found beyond a reasonable doubt that petitioner committed the offense of murder. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Moore v. Duckworth*, 443 U.S. 713, 99 S.Ct. 3088, 61 L.Ed.2d 865 (1979) (per curiam). Under this analysis, however, there is evidence to support petitioner's conviction for concealing the death of Hellen Hanks.

The purpose of this discussion is not to implicate Mr. E.K. Wilcox, Sr. in the murder of Hellen Hanks, but to show that an alternative hypothesis exists under the evidence presented at trial which is consistent with petitioner's innocence. This discussion is only a *hypothesis*, and is not to be construed as an accusation by this court of Mr. E.K. Wilcox, Sr.

Georgia law provides:

> [a]ny party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed *and that he was a party thereto*, although the person claimed to have directly committed the crime has not been prosecuted or convicted has been convicted of a different crime or degree of crime, or is not amenable to justice or has been acquitted.

O.C.G.A. § 16-2-21 (1984) (emphasis added).

Assuming hypothetically that Mr. Wilcox, Sr. murdered Ms. Hanks, the court must next determine whether the evidence at trial was nevertheless sufficient to uphold petitioner's convictions in light of O.C.G.A. § 16-2-21. In other words, even though petitioner's conviction must be reversed because of the existence of a reasonable alternative hypothesis to explain Ms. Hanks' death, the court must decide whether the evidence supports petitioner's conviction as an aider and abettor petitioner's conviction as an aider and abettor of his father. Assuming that the crime of murder was committed by peitioner's father, there is no evidence in the record to establish that petitioner was a party to the crime. Wrentz's testimony that petitioner assisted his father in burying Ms. Hanks' body, *assuming that testimony to be true*, does not support a finding that petitioner was a party to the murder. The inference is too tenuous and the consequence (life imprisonment) is too serious to allow petitioner's conviction to stand under O.C.G.A. § 16-2-21. Even assuming his father committed the crime, there is still insufficient evidence to establish that petitioner was a party to the murder; thus he cannot constitutionally be found guilty of murder as an aider and abettor of his father.

IV. Rationality Standard

[4] The *Jackson* test requires this court to review the evidence from the standpoint of a *rational* trier of fact. *Id.* at 319, 99 S.Ct. at 2789. Thus, while this court must view all evidence in the light most favorable to the prosecution, any construction of the evidence for the benefit of the prosecution must necessarily fall within the bounds of rationality. The test announced in *Jackson* "gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inference from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789 (emphasis

added). Just as other courts have rejected the idea that all conflicting inferences, no matter how weak, will be resolved in favor of the prosecution, this court rejects the idea that all conflicts in testimony are to be resolved in favor of the prosecution. *Cosby v. Jones*, 682 F.2d 1373, 1383 n. 21 (11th Cir.1982). Instead, conflicts in testimony, including those requiring credibility determinations, will be resolved in favor of the prosecution to the extent permitted by rationality. Thus, if the conviction of a defendant rests entirely upon a portion of testimony, and to accept that testimony as true would be a mockery of rational thought, whether on its face or in light of conflicting testimony, then the defendant's conviction cannot stand. In the Eleventh Circuit's words,

> [A problem] arises when the testimony credited by the jury is so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable person would believe it beyond a reasonable doubt. The mere fact that the testimony is in the record is not enough. If a witness were to testify that he ran a mile in a minute, that could not be accepted, even if undisputed. If one testified, without dispute, that he walked for an hour through a heavy rain but none of it fell on him, there would be no believers.

United States v. Chancey, 715 F.2d 543, 546-47 (11th Cir.1983).

With these principles in mind, this court will now reexamine the key testimony presented at trial. Petitioner's convictions for murder and concealing a death rest almost entirely on the testimony of Ed Wrentz. Mr. Wrentz's testimony provided the sole direct link between petitioner and Ms. Hanks' disappearance. At the time of trial, Mr. Wrentz was seventy-eight years old. A review of the transcript shows that his testimony was often confused and at times incoherent. On direct examination, Mr. Wrentz related the

story previously discussed in which he told of the burial of Ms. Hanks involving petitioner, petitioner's father, himself, and Lorenzo Marshall. On cross-examination, he recanted this entire story, but he did recall digging a hole. What hole and when it was dug was not indicated by his testimony. On redirect examination, he was again able to provide the same story he had first told on direct examination. Thus, Mr. Wrentz's testimony was internally inconsistent.

Mr. Wrentz's testimony showed that Lorenzo Marshall could corroborate his story. However, Mr. Marshall testified that he knew nothing of Ms. Hanks' disappearance and denied the story related by Mr. Wrentz. Mr. Marshall testified that on the night Mr. Wrentz's story must have taken place-the night it rained-he (Mr. Marshall) was in Albany and thus could not have been with Mr. Wrentz. His presence in Albany was corroborated by two other Wilcox employees who were with him in Albany on business. Mr. Marshall's testimony was consistent throughout.

During his testimony, a statement Mr. Marshall had given the police was introduced against him for impeachment purposes. That statement corroborated the statement given by Mr. Wrentz and was also the result of extensive and prolonged police interrogation. Mr. Marshall was seventy years old at the time of trial. At trial, he acknowledged the statement's authenticity, but denied its contents, explaining that it was the result of police coercion.

Viewing Mr. Wrentz's inconsistent and at time incoherent testimony in light of the testimony given by Mr. Marshall and his corroborating witnesses, *it insults rational thought to attribute to Mr. Wrentz's testimony the degree of credibility necessary to justify a conviction for murder and life imprisonment.* Thus, this court must conclude that a fair resolution of the conflict between the testimony of Mr. Wrentz and Mr. Marshall must be made in favor of petitioner. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Having made this resolution, this court must conclude that no rational trier of fact could have found beyond a reasonable doubt that petitioner was guilty of murder and of concealing a death. *Id.* Since this decision is based upon the sufficiency of the evidence, the state is barred from retrying the petitioner. *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978).

V. Police Misconduct

[5, 6] Petitioner also claims that the conduct of the police officers was so outrageous as to violate due process. Outrageous governmental conduct is a legal defense in a criminal case. *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973). The Supreme Court stated in 1952 that a conviction obtained through police conduct that "shocks the conscience" offends the Due Process Clause. *Rochin v. California*, 342 U.S. 165, 172-74, 72 S.Ct. 205, 209-11, 96 L.Ed. 183 (1952). An indictment should be dismissed only when the law enforcement conduct violates " ' fundamental fairmess, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Russell*, 411 U.S. at 432, 93 S.Ct. at 1643. The Eleventh Circuit has followed the *Russell* test. *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir.1984). To determine whether outrageous governmental conduct exists in the present case, the court should look at the totality of the circumstances. *Id.*

The alleged police misconduct in this case occurred during the interrogation of three employees of Wilcox Outdoor Advertising: John Goodman, Edward Wrentz, and Lorenzo Marshall. The court will review the interrogation of each employee *seriatem*.

The portions of the interrogations quoted below are taken from the transcripts of tape recordings of the police interviews. The tape recordings and the transcripts of the those recordings were not part of the state habeas

court or the Georgia Supreme Court record. However, in this federal habeas proceeding, this court directed the respondent to file all cassette tapes and transcripts of the police interrogations with the court. The respondent subsequently filed twenty-one cassette tapes and thirteen transcripts, labeled as follows:

TAPES

TAPE NO.	SUBJECT:	DATE:
(1)	Edward Smith	12-08-80
(2)	Edward Smith	12-08-80
(3)	Unnamed	
(4)	Unnamed (hc)	12-08-81
(5)	Unnamed (hc)	12-08-81
(6)	Unnamed	
(7)	Unnamed (hc)	12-08-81
(8)	Capt. Register interview of murder	
(9)	Edward Wrentz	November
(10)	Unnamed (hc)	12-08-81
(11)	Edward Wrentz (cont.)	November
(12)	Freddie Smith	07-31-81
(13)	Lorenzo Marshall	12-08-80, By Register and Selph
(14)	Lottie Chappell	12-18-80
(15)	Nina Bramblett	12-10-80
(16)	John Wesley Goodman	12-08-81 (Billy E. Register)
(17)	John Wesley Goodman	12-08-81 (Billy E. Register)
(18)	John Wesley Goodman	12-08-81 (Billy E. Register)

TAPES (continued)

TAPE NO.	SUBJECT:	DATE:
(19)	Edward Wrentz	By Selph & Spray
(20)	Began 12:37 p.m.	07-01-81
(21)	Began 12:37 p.m.	07-01-81

TRANSCRIPTS

NUMBER:	SUBJECT:	DATE	PAGES
(1)	John Wesley Goodman	11-28-80	1-39
(2)	Anonymous Caller	12-06-80	1-9
(3)	Edward Smith	12-08-80	1-18
(4)	Lorenzo Marshall	12-08-80	1-11
(5)	Edward Wrentz	12-09-80	1-6
(6)	Nina Bramblett	12-10-80	1-4
(7)	Lottie Chappell	12-18-80	1-4
(8)	Edward Wrentz	04-10-81	1-31
(9)	Mr. James Hanks	06-26-81	1
(10)	Edward Wrentz	07-01-81	1-50
(11)	Edward Wrentz and Lorenzo Marshall	07-02-81	1-47
(12)	Carroll Proctor Scruggs	Not Dated	1-15
(13)	Lucy S. Hanks	Not Dated	1-19

This court thus has some 254 pages of transcripts and tape recordings of police interrogations that occurred over an eight-month period. The portions of the transcripts quoted below represent only a limited sample of those tape recordings and trancripts. All the interviews conducted by the police officers were not tape recorded, so the tape cassettes on file cover only part of the interrogations.

The transcripts are quoted verbatim, with no editing by the court. Readers of this opinion should realize that it is impossible to comprehend the full extent of the character of the interrogations without listening to the tape recordings in their entirety.

A. Interrogation of Goodman

John Goodman was an employee of Willcox Outdoor Advertising at the time Hellen Hanks disappeared. Exhibit A at 1. He was thirty-five years old when he was first interviewed in the course of the murder investigation. *Id.* That interview occurred on November 28, 1980. *Id.*

During the interrogation, Officers Register and Selph insinuated to Goodman that they had found his fingerprints on a cash box buried with Ms. Hanks:

Officer Selph: Do you know what fingerprints are?

Mr. Goodman: Yea, Ya'll got mine about here about 8 or 9 times.

Officer Selph: You know that if I touch that desk right there, and you come behind me and he dusts that right there he can lift my print off of there?

Mr. Goodman: Yea.

Officer Selph: That he can do it now, or he can do it 10 years from now.

Mr. Goodman: Still ain't got nothing to do with me.

Officer Selph: They ain't nobody got a fingerprint like mine and ain't nobody got none like you.

Mr. Goodman: (talked over) cause my fingerprint ain't on this desk no where cause I ain't caught it.

Officer Selph: I said nothing like that. But we got a bunch of fingerprints.

Mr. Goodman: Alright, well I'll make you take mine right now and mine won't compare with none of the fingerprints you got, not if they come up because somebody was did something, if they did something, and if

they did come up with a group of pair that somebody was working on the job you got them out a building, not from anywhere else, That I have caught.

Officer Register: How about off a cash box, Johnny.

Mr. Goodman: I ain't never caught no cash box, so my fingerprints wouldn't be on it.

Officer Register: If you ain't never touched it, your fingerprints wouldn't be on it then right?

Mr. Goodman: Right on.

Officer Selph: What if it showed on there.

Mr. Goodman: If it showed up on me I must have did something. You can take my prints right now then, cause I haven't did nothing.

Exhibit A at 11.

The officers also threatened three times during the interview to "fry his ass":

Officer Register: Have we give you an opportunity to tell us the truth?

Mr. Goodman: Yes. I told you the truth.

Officer Register: Cause I may fry your ass son. Don't blame him and don't blame me cause we've done our good little damnest that you'd straighten that business out. And just as sure as you don't straighten your business out thats whats going to happen to you John, cause I may fry your ass.

Mr. Goodman: I done told you the truth.

Officer Register: No you hadn't Johnny. You didn't tell them the truth then and you ain't telling us the truth now.

Mr. Goodman: I just can't remember that far back. Thats all there is to it.

Officer Register: You lied to them then.

Mr. Goodman: No.

Officer Register: Yes you did.

Mr. Goodman: No.

Officer Register: We can prove it son.

Mr. Goodman: No (Uh Uh) I didn't lie to them then and I'm not lying to you now.

Exhibit A at 31-32. Also:

Officer Register: I seen 3 things about you right quick. You ain't blind.

Mr. Goodman: Okay.

Officer Register: You ain't deaf, and you ain't dumb.

Mr. Goodman: Okay, I ain't blind stupid or crazy.

Officer Register: Thats right. Thats all we asked you. I asked you to understand what we was looking into. but you know we ain't interested in in somebody goofing off from work. We ain't interested in somebody visiting a gal on the day before in Fitzgerald. We ain't interested in that Bullshit John. When this thing winds up when it finishes up two people's ass is going to burn in an electric chair. Ain't no if's and's or but's.

Mr. Goodman: Uh.

Officer Register: Ain't no if and's or but's. One of them is going to be yours Johnny.

Mr. Goodman: Uh Uh (No) Ain't no way.

Officer Register: All kind of ways Johnny.

Exhibit A at 33. The officers told Goodman that they planned to hold him indefinitely.

Mr. Goodman: How long ya'll going to keep me down here?

Officer Register: How long you think your might live Johnny?

Mr. Goodman: (sounds like) Indefinitely.

Officer Register: Thats how long were going to keep ya.

Mr. Goodman: Alright. I don't remember and I'll just sleep.

Officer Register: You don't have to worry about Ms. Hanks getting sleepy Johnny.

Officer Selph: Cause her bones is over there at the Crime Lab.

Exhibit A at 33.

The following questions and answers are indicative of the type of interrogation that Goodman was subjected to.

Officer Register: You reckon if we turned you loose tonight that you would be back here at 3 o'clock tomorrow evening?

Mr. Goodman: I'll try and make it.

Officer Register: You'll try?

Mr. Goodman: Yes.

Officer Register: Well if you just going to try John, just as well keep you. Alright lets me and you get one thing straight okay?

Mr. Goodman: Okay.

Officer Register: I ain't going in for I try, I think, maybe, could have been. Okay?

Mr. Goodman: Yea.

Officer Register: Don't deal in that shit at all.

Mr. Goodman: But what's my fine going to be what you call it bond.

Officer Register: You ain't got no fucking bond.

Mr. Goodman: Oh.

Officer Register: I am asking you a sensible question in front of a witness and on a tape okay? We turn your ass loose from here tonight, will you be back here tonight, will you be back here at 3 o'clock tomorrow afternoon sober? And ready to take a polygraph?

Mr. Goodman: Yes sir.

Officer Register: Because if you will not and if you are not here at 3 o'clock tommorrow afternoon sober and ready to take a polygraph I intend to issue a murder warrant for you. Intend to pick you up and hold you without a bond, because murder is not bondable.

* * * * * *

Officer Register: I'll see you (can't understand). 3 o'clock Johnny right here.

Mr. Goodman: Yes sir.

Officer Selph: Whats going to happen if you don't come up here sober.

Mr. Goodman: He's going to take a warrant out for me.

Officer Selph: What kind of warrant?

Mr. Goodman: A murder warrant.

Officer Selph: Thats right.

Office Register: And I'm going to hunt you John, with four hands of dirt if I have too. And I'm going to bring you back to Valdosta Georgia...

Mr. Goodman: Well I'll be a two places thats out there off (can't understand) out ther working or at home.

Officer Register: Well at 3 o'clock tomorrow afternoon if you ain't in one place I'M going to hunt you if I have to go to four corners of the earth to hunt you and I am going to bring you to this Valdosta Police Dept. one way or another when I've got that murder warrant in my hand, and it says bring the body.

Mr. Goodman: Well, you want have to do all that.

Officer Register: I hope I don't. I hope I don't.

Mr. Goodman: I'll be here, I can remember that far.

Officer Register: And I dont mean five minutes after 3, none of that bullshit, I mean 3 O'clock.

Exhibit A at 38-39.

Despite the officers' interrogation tactics, Goodman

maintained continuously that he had no knowledge of Ms. Hanks' disappearance.

B. Interrogation of Wrentz

Like Goodman, Edward Wrentz was employed by Wilcox Outdoor Advertising at the time of Ms. Hanks' disappearance. He is an elderly black man who has a limited education and who cannot read or write well. At the evidentiary hearing held by this court, Officer Register described Wrentz as follows:

> Well, Mr. Wrentz struck me as a very old gentlemen who the first thing he done when you walked up to him, he took his hat off, what I would call the "old slave syndrome." After talking with Mr. Wrentz initially, whenever that was, I still don't remember when it was, I found out that Mr. Wrentz would agree with a white person if you asked him a question, 'well, didn't you do so and so,' he'd say, 'Yes sir.' It didn't make any difference, 'Didn't you kill President Kennedy? Yes sir.' Didn't you—.' You know, whatever, he would agree with you . . .

Transcript of Hearing on July 9, 1985, at 26.

Police officers interviewed Wrentz on at least five occasions: December 9, 1980; April 9, 1981; April 10, 1981; July 1, 1981; and July 2, 1981. In the first interview, Wrentz told Officers Register and Selph that he knew nothing about Ms. Hanks' disappearance. Exhibit D at 1, 4.

Officer Selph wrote in his investigative report that he and Officer Register interviewed Wrentz again on April 9, 1981. Exhibit E; Exhibit F at 27; Exhibit G at 21. However, it appears that this interview was not transcribed or tape recorded.

On April 10, 1981, Wrentz was interviewed by Officer Norris of the Valdosta Police Department. Exhibit G at 1. Wrentz told Officer Norris that he believed Ms. Hanks' disappearance was an accident. Exhibit G at 2. The following discussion then occurred:

Officer Norris: You telling me that's all you know?

Mr. Wrentz: It's all I know.

Officer Norris: You want to be charged with murder.

Mr. Wrentz: No.

Officer Norris: Uh?

Mr. Wrentz: No sir, I don't want to be charged with Murder. With no Murder, really I don't want to be charged with no murder.

Officer Norris: You said you wanted me to help you.

Mr. Wrentz: Yes sir.

Officer Norris: I can't help you with what you told me.

Officer Norris: I don't believe that that's all you know.

* * *

Officer Norris: A lot of people can be fooled.

Mr. Wrentz: Oh yea.

Officer Norris: But if you study criminal justice, and if you study how to question people, you study how to go about getting of answers from people you'll find that all of these things play an important part. I can go to the Chief of Police you had no part in it, that this is what you know, okay?

Mr. Wrentz: Yea.

Officer Norris: If that's what you want me to do. Okay?

Officer Norris: If you don't want me to do that, then . . .

Mr. Wrentz: Well I want you to do that.

Officer Norris: Then your going to have to be, your going to have to tell me the truth, the truth, the whole truth, and nothing but the truth. And that's what I want.

Mr. Wrentz: Nothing but the truth.

Officer Norris: I'm just going to listen to what you say, I'm not going to say a word.

Mr. Wrentz: Well I'm just . . .

Officer Norris: I know your nervous. Right? Okay. You don't want to get involved.

Mr. Wrentz: Yes.

Mr. Wrentz: I really, I'd rather get involved than it be on me.

Officer Norris: Well then you better start talking to me then.

Exhibit G at 2-3. Shortly after these statements were made, Officer Norris took what he describes as a five-minute break. Exhibit G at 10. The transcript of the interrogation does not indicate the length of the break, and the conversations that took place during the break are not transcribed. Immediately after the break, the interrogation continued as follows:

Officer Norris: You know who digged the hole. And put a tin box in it. Where ever that box, I don't know where it was found, but you knew, you do.

Mr. Wrentz: Tin box come out of the office out there. I mean, out the warehouse, part out there.

Officer Norris: Alright, who dug the hole?

Mr. Wrentz: (Silence) Well I dug the hole.

Officer Norris: By yourself?

Mr. Wrentz: Yea.

Officer Norris: Who asked you to dig it?

Mr. Wrentz: Well who asked me to dig it?

Officer Norris: Um Um.

Mr. Wrentz: (Silence) I will say Keller [the petitioner].

Officer Norris: But who asked you to dig it?

Mr. Wrentz: Who asked me to dig the hole?

Officer Norris: Yes.

Mr. Wrentz: Oh asked me to dig the hole?

Officer Norris: Um Um.

Mr. Wrentz: (Silence). Who asked me to dig the hole?

Officer Norris: Who asked you or who told you I don't care how you answer it just tell . . .

Mr. Wrentz: Yea, but you want a answer.

Officer Norris: Right.

Mr. Wrentz: Um Um. I would say, Mr. Wilcox.

Officer Norris: The old man?

Mr. Wrentz: Yea. I'd say that.

Exhibit G at 10-11. The remainder of the interrogation consisted of additional questions and answers concerning the burial of Ms. Hanks' body. Wrentz's answers were inconsistent and confused. Wrentz did say that he had been taken to the burial site the day before the interview. He did not name the individuals who took him to the burial site. Exhibit G at 12 ("I went out there, they take me out there yesterday."). Toward the end of this interview, Wrentz stated that, "The day she went missing I was out of the town." Exhibit G at 29. He thus completely contradicted his statement about the burial of the box.

Wrentz was interrogated again on July 1, 1981, by Officers Spray and Selph. Exhibit H at 1. Wrentz's first statement in the interview was that he had no knowledge of Ms. Hanks' disappearance:

Officer Spray: Going back to the time where Helen Hanks went missing. Tell me what you know about it and your involvement in it.

Mr. Wrentz: Don't know anything about it.

Officer Spray: Uh?

Mr. Wrentz: I don't know anything about it.

Officer Spray: You don't know anything about it. Uh, you didn't help dig no hole?

Mr. Wrentz: No sir.

Officer Spray: You didn't? You didn't tell nobody that?

Mr. Wrentz: I might made an earlier statement but I was afraid.

Exhibit H at 1. Officers Spray and Selph then began their intimidation tactics:

Officer Spray: Now as I told you earlier, you got to answer to God Almighty, for, for your dealings here on earth. When that time comes. As I told you earlier you you ain't no young man no more.

Mr. Wrentz: No sir.

Officer Spray: You ain't no young man. I wish I knew I could live to be as old as you are. But you never know. Never know when you going to come down and take it. Now we want to know about the digging of the the hole, how it all happened. I want to hear it myself. Mr. Selph here's already heard it.

Mr. Wrentz: Yes sir.

Officer Spray: I hadn't. I hadn't heard it from you. That's what I want to do, I want to hear it from you. And I want the truth now Ed. Okay, I don't want you go on around talking in circles, and beating around the bush.

Mr. Wrentz: No sir, I don't want to beat around the bushes, speaking of of, speaking of . . . (Is What It Sounded Like) Just like I said before hand, I was upset and I didn't know what (except that I had . . . (is what it sounded like) but I didn't get no, you know, understanding like you explained it to me.

Officer Spray: Um Um.

Mr. Wrentz: (Mumbled)

Officer Spray: Okay Ed, let, let, me see if we can do it this way then. You dug that hole didn't you?

Mr. Wrentz: No sir, I . . .

Officer Spray: Yes you did Ed. Now, don't sit there and lie to me now, I done asked you don't lie to me.

Mr. Wrentz: No, (Mumbled).

Officer Spray: I already no better.

Mr. Wrentz: Yes sir.

Officer Spray: You dug that hole didn't you? Uh? Ed answer me?

Mr. Wrentz: (Mumbled), I don't know how . . .

Officer Selph: Ed, don't sit there and lie to the man.

Mr. Wrentz: No sir. That's why I ain't going to lie to the man.

Officer Spray: No, I don't want no lies in here.

Mr. Wrentz: Yes.

Officer Spray: You dug that hole didn't you Ed?

Mr. Wrentz: (Silence)

Officer Spray: Out there in the woods? Ed, I want an answer now.

Mr. Wrentz: What (?)

Mr. Wrentz: Yes sir.

Officer Spray: I want a answer, want the truth.

Mr. Wrentz: Yes sir.

Mr. Wrentz: I want to, I want to tell you the truth.

Officer Spray: That's exactly what I want to hear, and I want to hear it now. Okay?

Mr. Wrentz: Yes sir.

Officer Spray: I want the truth. Look me in the eyes and tell me the truth.

Mr. Wrentz: I can look in your eyes and tell you the truth.

Officer Spray: That's what I want to hear, the truth. You dug that hole didn't you Ed? Ed, your fixing to lie to me now, your looking off over yonder somewhere.

Mr. Wrentz: Yes. OR Yes sir.

Officer Spray: Tell me the truth. You dug that hole didn't you?

Mr. Wrentz: (Silence)

Officer Selph: Tell the man the truth Ed.

Mr. Wrentz: Yes sir. (Mumbled).

Officer Selph: You got to answer . . .

Mr. Wrentz: Yes.

Officer Selph: with your part in what happened. And your the only man that can answer for your part. You got to answer to God for what you done in your life.

Mr. Wrentz: Yes.

Officer Selph: You got to stand on your own two feet.

Mr. Wrentz: Yes sir.

Officer Selph: Now tell the man the truth.

Officer Spray: I want to know about the hole Ed.

Mr. Wrentz: Know about the hole?

Officer Spray: Yea. You dug it didn't you?

Mr. Wrentz/ (Silence).

Officer Spray: Ed?

Mr. Wrentz: Sir.

Officer Spray: Look at me and answer me now.

Mr. Wrentz: Yes sir, I'm, I'm going . . .

Officer Spray: I'm not going keep on chewing my clabber twice now.

Mr. Wrentz: No . . .

Officer Spray: You've heard that before too, I'm sure . . .

Mr. Wrentz: Yes, yes sir, yes sir, I've heard that before.

Officer Spray: I want a answer.

Mr. Wrentz: (Mumbled).

Officer Selph: Were going, we want to get it over with today Ed.

Mr. Wrentz: Yes sir.

Officer Spray: Now, if we have to stay here till next week sometime, just me and you and him talking we going to sit right here Ed. Now, you can beat around the bush all you want to . . .

Mr. Wrentz: (Mumbled)

Officer Spray: Will sit here and talk all you want to. Get it off your chest Ed. It's going to worry you slap to death if you don't. It's going to worry you and you can't tell me it ain't been worrying you, cause I know it has. Now I want to know about the hole. You dug the hole didn't you Ed?

Wrentz: Yes sir, I admitted digging the hole.

Officer Spray: Okay.

Exhibit H at 2-3. Officer Spray later threatened Wrentz by saying:

Alright, we got one lie, number 2. Now the whole mess going to fall on you Ed. Going to fall right on you if you ain't careful. Now I already no the answers to these questions or I woudn't be asking. Okay? Knew the answers before you ever come down here. Alright, just so we get even with one another, I want us even.

Exhibit H at 4. The officers next suggested the statements to Wrentz by putting words in his mouth. The following passage from the transcript is a typical example of how officers coerced Wrentz into implicating petitioner in the crime.

Officer Selph: Going back to August the 31st, 1972, was on a Thursday. Ms. Helen Hanks went missing. In the Lamar Wilcox Advertising Office down there. I want you to tell Mr. Spray like you told me back a few weeks ago, who come to you and told you that he wanted you to do some work for him, took you out West of town out there, in a wooded area, showed you a place on the ground where he wanted you to dig a hole for him. I want you

to tell Mr. Spray about that. Ed, tell him the truth the whole truth and nothing but the truth.

Officer Spray: Okay Ed, I'm ready to listen now, you've, you've thought about it, done got you down for 2 lies, Now, don't get caught up in a bunch of lies, now, like I told you, I already know the answers and these questions, before we ever get started. You've already told us you dug the hole, is that right?

Mr. Wrentz: Sir?

Officer Spray: You've already told us you dug the hole, now I know your not hard of hearing.

Mr. Wrentz: No sir, I ain't hard of (hearing) . . .

Officer Spray: Your not hard of hearing. (2 Talking). You dug the hole.

Mr. Wrentz: Say I dug the hole?

Officer Spray: No, you said it not me. I didn't say you dug that hole, you said you dug it. Alright, who had you dig the hole? Who showed you where to go? Cause you done told us you don't drive. And you just didn't happen to go out there. Things just don't happen that way, Ed. Now like I said you've been around a long time you know this just as well as I do. Things just don't happen that way. Now, I want to know about who told you to dig the hole, who showed you where to go? Ed, that's not a hard question.

Mr. Wrentz: Certainly not a hard question.

Officer Spray: That's not a hard question at all. I want an answer.

Officer Spray: Ed, I'm in a habit when I talk to somebody have em look at me.

Mr. Wrentz: Yes sir. Cause I try to look at the person . . .

Officer Spray: Um Um. (you talk at) and I want an answer. I'm in the habit of having people answer me

looking at me to.

Mr. Wrentz: Yes, yes, yes sir. Um Um.

Officer Spray: Not looking around the walls and all this kind of business just like your doing. That tells me you fixing to tell me a lie. I don't want hear no lies, I don't want that. You don't want that. I know you don't want to tell me no lie Ed. I know that. Now who told you to dig that hole? Was it me?

Mr. Wrentz: No sir.

Officer Spray: Was it him?

Mr. Wrentz: No sir.

Officer Spray: Alright, who was it?

Mr. Wrentz: (Silence)

Officer Spray: Now we can,

Officer Spray: (Now) we can go all day about who it wasn't. I don't want to know who it wasn't, I want to know who it was. Who told you to dig that hole. That's not a hard question now, I want an answer.

Officer Selph: All you got to do is tell the truth Ed.

Officer Spray: That's not hard to do.

Officer Spray: I'm listening Ed.

Mr. Wrentz: Yes.

Officer Spray: I want an answer.

Officer Selph: Who was the person that took you out there and showed you where he wanted that hole dug, and he told you to dig that hole?

Mr. Wrentz: (Silence).

Officer Selph: Answer the man Ed. Look at him the eye and answer him.

Officer Spray: Yes. (Is What It Sounded Like)

Officer Spray: I want an answer.

Mr. Wrentz: An answer.

Officer Selph: Who was it. You can say his name just as good as I can.

Officer Spray: And you know it just as good as I know it.

Officer Spray: Do you want me to tell you? Uh?

Mr. Wrentz: Well I don't know . . .

Officer Spray: Yes you do, Ed. Don't, alright number 3. I'm writing it all down.

Mr. Wrentz: (Mumbled). (Possibly) Yes sir, I know it's number 3.

Officer Spray: Don't let the mess fall on you Ed.

Mr. Wrentz: No sir . . .

Officer Spray: I'm telling you ahead of time. You fallen right in that trap. You falling right in it.

Officer Selph: Alright, let's go to this for a minute. When you went out there and started digging the hole, who was with you out there digging the hole? The first time. Was it night time or daylight?

Mr. Wrentz: (Silence). Lord have mercy.

Exhibit H at 4-5.

The following comments by the officers show the relentless, intimidating interrogation techniques to which Mr. Wrentz was subjected.

QUESTION: Ed, you've got every bit of this tied up inside of you, all these answers, you know the answers that we want concerning the digging of the hole, and burying that box that had Mrs. Hank's body in it. You know who asked you to dig that hold, you know who was responsible for her being missing. You know who is responsible for her death. That woman wanted to live just as bad as you do.

QUESTION: Would you like somebody to come along and just snuff out you life?

ANSWER: No sir.

QUESTION: That's what happened to her, she didn't want it either.

Exhibit H at 6.

If me and you and him have to sit here for a solid week, Ed, will sit here.

Exhibit H at 6.

You got to answer for em not me. You got the answer for em now, or on Judgement Day. Now which one do you want? Now or Judgement Day?

Exhibit H at 6.

Ed, you've got to answer for you own sins, those people over there's going to answer for theirs.

Exhibit H at 12.

Do you want to go down with the rest of them, Ed?

Exhibit H at 15.

She's [Ms. Hanks] dead and gone she aint going to bother you except . . . in your memory, that's the only way she's going to bother you.

Exhibit H at 16.

Now do you want that to haunt you the rest of your life? And you ain't got much more left in this world.

Exhibit H at 20.

It's time for justice for that woman now. And we going to get it one way or the other.

Exhibit H at 21.

Ed, are you going to sit here and lie to us the rest of the day? If you are, we got a place for you back there in the jail house, where you can tell all the lies you want to.

Exhibit H at 23-24.

Later in the interview, the following discussion took place between Officer Spray and Mr. Wrentz:

QUESTION: Ed, do you want to go to hail?

ANSWER: No sir.

QUESTION: For a long, long time?

ANSWER: No sir.

QUESTION: Who cut the legs off?

QUESTION: Uh?

ANSWER: I'd say uh, Mister, Mr. Wilcox.

Question: Did he?

ANSWER: Thats what I say . . . I . . .

QUESTION: Did he?

ANSWER: Yes sir.

QUESTION: Is that the truth?

QUESTION: Put you hand right here, and tell me, right there on that Bible.

ANSWER: Right there?

QUESTION: Right there on that Bible. Put your hand on it.

ANSWER: (Mumbled), I know it, (?) but then I worry about changing my say so, still put my hand there?

QUESTION: You put your hand on that Bible just like that, and you tell me the truth.

ANSWER: That's what I say . . . (EW & CS Talking)

QUESTION: and you hold that other hand up to Almighty God, put it down there, tell me, hold that other hand up . . .

QUESTION: Tell me, tell me who you seen cut the legs off . . .

QUESTION: hold, hold the other hand up . . .

ANSWER: Who I seen?

QUESTION: Yea, Ed, hold that other hand up to Almighty God, and you tell me, stick it up there.

Exhibit H at 41. Officer Spray subsequently warned Wrentz to "[t]ake your hand off that Bible, God's going to strike you dead . . . ". Exhibit H at 42. Officer Spray asked Wrentz, "Ed, are are you scared of somebody coming down here and getting you and taking you out and stringing you up somewhere, are you scared of that?" Exhibit H at 43.

The police officers also threatened to put Wrentz in jail and told him that he was going to go to hell:

Officer Spray: Ed, you ain't making no sense again now.

Mr. Wrentz: Yes sir.

Officer Spray: Your bullshiting is about to run out.

Mr. Wrentz: Ummmmmm.

Officer Spray: Cause I'm about that close to putting you ass in jail now, and you can rot there for all I care. Now apparently you don't want us to help, you don't want our help.

Mr. Wrentz: (Mumbled), yes I do too.

Officer Spray: No you don't.

Mr. Wrentz: Yes sir.

Officer Spray: No you don't, if you did you'd come up, something else besides this off the wall shit. You ain't wanting to do right.

Mr. Wrentz: Yes sir, I . . . (2 Talking). right.

Officer Spray: No you ain't.

Officer Selph: No you ain't.

Mr. Wrentz: I do.

Officer Spray: Uh?

Mr. Wrentz: Yes sir I want to do right.

Officer Spray: Well why don't you, why can't you answer questions?

Officer Spray: You ain't making no sense.

Now why can't you answer questions?

Mr. Wrentz: (But) I'll answer them them best I can . . .

Officer Spray: No you ain't, no you ain't Ed. I ain't use to calling a grown man a liar, but thats just what you doing Ed, you lying. And your going to go to hell for lying. I don't give a damn how many Wilcox's you try to protect, I don't care. Don't care how scared you are of them people. That ain't worth a damn. We got a dead woman right here. That womans dead. And if it takes your life to find out who killed her, fine, you can spend the rest of it in prison. If it takes Keller, fine he can spend the rest of it in prison. If it takes the old man, he can spend the rest of it in . . . it don't make a shit to me. Now you can knock off this bullshit. You can knock it off. Now. I want to know how that woman died. How did she die? Was she cut, was she stabbed, was she shot, was she choked, how, how'd she die? Now you can't tell me you don't know. How did she die, very simply question, very simple answer. How'd she die?

Officer Spray: Uh?

Mr. Wrentz: How did she die?

Officer Spray: Yea. Thats just like when it comes your day to die, there going to know exactly how you died. Whether you have a heart attack, or stroke or whatever, there going to know how you died. I want to know how she died. She's gone. How did she die Ed? Uh?

Exhibit H at 47-48

C. Interrogation of Marshall

The petitioner also contends that the interrogation of Lorenzo Marshall constitutes police coercion that "shocks the conscience." Marshall was seventy years old at the time of petitioner's trial. He is now deceased. Marshall who was black, had a fourth grade education and could not read or write well.

Marshall was interviewed by the police for the first time on December 8, 1980. During the interview Marshall

told Officers Register and Selph that the last time he saw Ms. Hanks was the Tuesday before she disappeared and that from that Tuesday until the following Friday he was in Albany, Georgia, on a work assignment with another employee of Wilcox Outdoor Advertising. Exhibit C at 1.

On July 2, 1981, Marshall was interviewed for a second time. Exhibit J at 1. Initially, Marshall told the police officers that he was out of town in Albany when Ms. Hanks disappeared, *id.* at 7, and that he did not help Wrentz dig a hole, *id.* at 9. The officers then began questioning him in an intimidating, coercive manner. They threatened to put him in prison:

Officer Spray: You getting on up in age aren't you?

Mr. Marshall: That's right. I was born in 19(11?)

Officer Spray: Um Um.

Officer Spray: You ain't got a whole lot more time left on this earth have you?

Mr. Marshall: I hope I have, I feel like a strong man.

Officer Spray: Um. Um.

Officer Spray: Time's going to slip away on you here and you ain't going to last forever, just like I ain't going to last forever. Gotta go one day.

Mr. Marshall: That's true.

Officer Spray: I hope you live to be 250 years old Lorenzo.

Mr. Marshall: Well, I hope I have, after use in my blood because the Lord let me live (Possibly what he said he was mumbling)

Officer Selph: What if you don't ever leave none of it?

Mr. Marshall: (Mumbling)

Officer Spray: Ed, you know whats fixing to happen, I mean Lorenzo you know what's fixing to happen?

Mr. Marshall: Uh Uh (No).

Officer Spray: We ain't in the habit of sending old men

to prison, your fixing to go.

Mr. Marshall: Sure enough?

Officer Spray: Your fixing to go.

Mr. Marshall: Okay.

Officer Spray: A big Court House right down here with the dome on top. Where you going to wind up at. You ain't telling us the truth.

Mr. Marshall: Told you all that I know.

Exhibit J at 12-13. Officer Spray would not accept Marshall's statement that he did not dig a hole.

Officer Spray: Maybe you don't know Lorenzo. But if you don't know, that [polygraph] machine back there don't lie. That machine cost $5,000.00 it dont lie. Now that machine will tell you alot, won't tell you alot of things. It won't tell us, us, what color you are, the machine won't. It won't tell us what time of day it is. It wont tell us where you at. it wont tell us what building your in, it won't tell you how many drinks of liquor you had, it won't tell you how many pieces of pussy you had but it will tell one important thing. When you lie. It will tell that. That's what it's made for.

Mr. Marshall: Well, I know I didn't dig no hole (He got pretty loud)

Officer Spray: I think you...did Lorenzo.

Mr. Marshall: (2 Talking) didn't dig no hole.

Officer Spray: I think you did Lorenzo.

Mr. Marshall: Well I just, well I just, die with them words in my mouth. Cause I was in Albany. And I'm ready to go now.

Officer Spray: The last man I know Lorenzo that said that you know how long he lived when he said that? About a week. He dies with them words in his mouth.

Exhibit J at 14

On two occasions, the officers told Marshall that he, Wrentz, and another Wilcox employee were going to the electric chair.

> Officer Selph: Whats going to happen, whats going to happen, Wilcox's is going to make you and Ed Wrentz go to the electric chair.
>
> Officer Spray: And Ellis Roundtree too.

Exhibit J at 15

> Officer Selph: (2 Talking) be responsible for it.
>
> Officer Spray: Ellis Roundtree too.

Exhibit J at 15.

> Officer Selph: Lorenzo I'm going to tell you right now whats going to happen. Two of yous going to prison and the others going to the electric chair. Something about those two white folks (POSSIBLY: can forget about?)

Exhibit J at 19. They told Marshall that he could avoid going to the electric chair if he told them "the truth":

> Officer Selph: Lorenzo, it's at the point right now, that they ain't nobody that can help but you. The truth, the whole truth, and nothing but the truth.
>
> Officers Selph and Spray: And that shouldn't be too hard to get. That should be easy. I don't want to see you go to prison, go to the electric chair, for something them white people responsible for. They got you involved in, because you worked for em', was loyal to them, we won't the people that killed her. We know who killed her, and that's the people that we want to send to prison and to the electric chair. (Is What It Sounded Like)

Exhibit J at 20. Edward Wrentz was brought into the interrogation room, where he stated in Marshall's presence that he and Marshall buried a metal box at the request of petitioner and petitioner's father. Exhibit J at 23. After lengthy coercive questioning, Marshall told the officers that he was involved in the burial of a metal box.

Marshall's interrogation lasted from 8:30 a.m. until 6:00 p.m. Exhibit M (transcript of commital hearing) at 270-74; Trial transcript at 906. Marshall was not provided with any food or water during this time. *Id.* During the interrogation Marshall signed a "voluntary statement" that incriminated the petitioner. Exhibit J at 45-46. Exhibit K.

On May 19, 1982, (after the jury trial) Marshall was deposed in connection with civil lawsuit that members of the Hanks family filed against the petitioner and his father. Exhibit O. Marshall stated in the disposition that he was in Albany on a work assignment during the week Hanks disappeared and that his "voluntary statement" was completely untrue. Exhibit O at 10, 21, 27, 29-42. Marshall stated in his deposition:

> QUESTION: All right. You say that the statement was untrue that you gave the police?
>
> ANSWER: Yes, sir.
>
> QUESTION: Is it completely untrue?
>
> ANSWER: Yes, sir.
>
> QUESTION: Nothing in it's the truth, is it?
>
> ANSWER: No, sir.
>
> QUESTION: Well, why did you–why did you give them an untrue statement?
>
> ANSWER: Well, I don't know myself. Them peoples kept us up there all day and they worried–and I mean, I just don't know why. And then Chief Arnold got up the last time walking out and told them to take a warrant for me for murder, and I–QUESTION: Chief Arnold?
>
> ANSWER: –I went to pieces. I just don't know what I was telling them.

Exhibit O at 30. Marshall further stated that the police officers coerced him into giving them a false statement:

> QUESTION: All right. You made the statement in the trial of the case that the police talked you into signing

the statement because they were going to set you free, is that correct?

ANSWER: That was it.

QUESTION: And that's what you swore to at that trial, do you remember that?

ANSWER: Yes, sir.

QUESTION: And that's what you're swearing to now as being the truth before God, is that right?

ANSWER: That's right.

QUESTION: If they hadn't told you that they were going to charge you with murder and if they hadn't told you they were going to set you free, would you have signed that statement?

ANSWER: No sir. I wouldn't have never made–I wouldn't have even agreed with it.

QUESTION: Did you freely and voluntarily sign the statement or do you think that they made you sign it by telling you that.

ANSWER: Well, I would say they caused me to sign it.

QUESTION: They are the ones–excuse me. They are the cause of you to sign it?

ANSWER: Yes, sir.

QUESTION: Without those statements being made, you wouldn't have signed it, would you?

ANSWER: No, sir.

QUESTION: Because you knew at the time it was not right?

ANSWER: Yes, sir.

Exhibit O at 33-34.

ANSWER: It seem that they were saying everything to make me believe that if I repeat what that man said I would go home.

QUESTION: If you repeated what "that man," being Ed Wrentz, said–ANSWER: Yes, sir.

QUESTION: –then you could go home?

ANSWER: He said, "You could go home with Ed Wrentz." "Go out of here with Ed Wrentz."

Exhibit O at 36.

QUESTION: You told them–you give them the statement that they demanded that you give them because they promised two things: that they were going to charge you with murder if you didn't, and if you did tell them what they wanted to know, they were going to turn you loose–ANSWER: Yes, sir.

QUESTION: –is that right?

ANSWER: Yes, sir.

QUESTION: And the statement you gave them was false?

ANSWER: Yes, sir. It was.

Exhibit O at 39.

QUESTION: And that the statement that you gave the police was forced out of you, is that right?

ANSWER: Yes, sir.

QUESTION: And you would not have signed it except for those tactics that the police used on you?

ANSWER: No, sir, I would not.

QUESTION: And it's false?

ANSWER: It's false.

Exhibit O at 42.

VI. The Appropriate Remedy for the Misconduct

The Georgia Supreme Court ruled that police misconduct in fact took place. That court stated:

> The appellant objects to what he alleges were intimidating interrogation techniques of several witnesses, particularly Lorenzo Marshall, Ed Wrentz, and John Goodman. Excerpts from the tape recordings of these interrogations were read into the record by the defense counsel while cross-examining the above witnesses. These excerpts reveal that the police used some questionable interrogation techniques, such as trickery, intimidation, and isolation, though it is difficult to judge the extent of their use from the limited excerpts available.

Wilcox v. State, 250 Ga. 745, 755, 301 S.E.2d 251, 259 (1983). This court, unlike the Georgia Supreme Court, does have the tape recordings and transcripts in their entirety. The court is confident that, had the Georgia Court also had a complete record before it, it would also have determined that the police misconduct in this case "shocks the conscience."

[7] It is clear beyond any question whatsoever that the police misconduct in this case "shocks the conscience" and thus violates the Due Process Clause. It is difficult to believe that police officers would threaten and intimidate people in the manner in which they did, especially knowing that two of the men–Wrentz and Marshall–were elderly. However, the tape recordings show without question that the egregious misconduct did in fact occur.

The decision of whether in fact the police engaged in the intimidation tactics alleged by the petitioner is entitled to the presumption of correctness under 28 U.S.C. § 2254(d). *Miller v. Fenton*, ___U.S.___, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Because this court agrees with the state court and accepts its finding that police misconduct did occur, there is no conflict in the two opinions.

Furthermore, as to the *extent* of the misconduct, this court is not required to follow the state court's holding, because "the material facts were not adequately developed at the State court hearing." 28 U.S.C.A. § 2254(d)(3) (West 1977). The Georgia Supreme Court acknowledged that it did not have all the facts. *Wilcox*, 250 Ga. at 755, 301 S.E.2d at 259. This court is thus free to decide the extent of the misconduct in this case. As stated above, it is clear beyond any question whatsoever that the police misconduct in this case "shocks the conscience" and thus rises to a level that violates the Due Process Clause.

Having made this determination, the remaining question is what remedy should be granted. Petitioner argues that the trial court should have granted a directed verdict in favor of petitioner or dismissed the charges against him. Peitioner's Application for Habeas Corpus at 5 (ground three). Respondent, on the other hand, contends that the appropriate remedy is the remedy determined by the Georgia Supreme Court: permitting petitioner to cross-examine any witness at trial concerning his interrogation by the police. Respondent's Brief in Support of Answer-Response at 17 (citing *Wilcox*, 250 Ga. at 756, 301 S.E.2d at 260).

[8] The determination of the proper remedy is a question of law left to the district court without application of § 2254(d)'s presumption of correctness. *See Summer v. Mata*, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir.1982). In this court's best judgment, the police misconduct in this case is not so egregious as to require dismissal of the indictment. *Cr. Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). However, the misconduct does rise to a level warranting a new trial for petitioner.

This court's concern is that the jurors in petitioner's trial returned their verdict without having the benefit of the entire picture. The jurors heard none of the tape

recordings of the interrogations. Furthermore, Wrentz, Marshall, and Goodman were cross-examined only to a very limited extent regarding their interrogation by the police. *See* Trial transcript at 153-60 (cross-examination of Goodman); at 891-905 (cross-examination of Wrentz); and at 1035-39 (cross-examination of Wrentz).

[9-11] Other misleading information heard by the jurors was Wrentz and Marshall's "voluntary statements." The statements are *extremely* short in light of the length of their interrogation. *See* Exhibit I (Wrentz's statement) and Exhibit K (Marshall's statement). The police officer obviously selected the few statements incriminating the petitioner and condensed those statements into a document. The "voluntary statements' introduced at trial[22] do not begin to accurately reflect the entire statements given by Wrentz and Marshall to the police officers. The jurors could not have made an informed, intelligent, and fair decision on petitioner's guilt or innocence without hearing the tape recordings in their entirety. Because the police misconduct in this case relates to the interrogation of Goodman, Wrentz, and Marshall, the appropriate remedy for the Due Process violation caused by the tactics used in those interrogations is to grant petitioner a new trial in which the *entire* tape recordings are played to the jury.[23]

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[22] Marshall's statement was introduced for impeachment purposes only.

[23] This remedy is particularly appropriate in light of the fact that the prosecutor failed to insure that the jurors heard all evidence favorable to petitioner. A *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), issue was not raised by petitioner and was expressly waived by him. Transcript of Hearing on July 9, 1985, at 163-65. While that issue is thus not before the court, it is nevertheless appropriate to consider the prosecutor's actions in fashioning a remedy for the due Process violation caused by police coercion. A prosecutor, as an officer of

(Footnote continued on the following page)

VII. Petitioner's Other Claims for Relief

Petitioner raises four other claims for habeas corpus relief. He contends (1) that the trial court erred by prohibiting counsel for petitioner from questioning the veniremen concerning their pre-existing opinions regarding which party ought to prevail, thus violating petitioner's rights under the Sixth Amendment; (2) that the trial court erred in failing to excuse a venireman who admitted on voir dire a fixed opinion as to petitioner's guilt; (3) that petitioner was deprived of his rights under the Sixth Amendment and the Due Process Clause, due to the false answer during voir dire of a venireman who was eventually selected as a juror; and (4) that petitioner was deprived of his Due Process rights by the admission of coerced testimony.

Of course, it is not necessary for the court to consider

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23 *(Continued)*

the court, has a duty to insure that the jury has complete and accurate information concerning the defendant in a criminal case. This is not to say that the prosecutor has the duty to assist the defense in presenting its case. *United States v. Herbst*, 641 F.2d 1161, 1168 n.11 (5th Cir.1981) (Unit B). The prosecutor does, however, have a duty to see that the evidence is fairly presented to the jury. The respondent has argued that, because the tape recordings and transcripts were made available to petitioner's attorneys at or before trial, the petitioner was the party responsible for insuring that the jurors heard the tape recordings and saw the transcripts of the recordings. That argument is without merit. A defendant in a criminal case is not required to produce any evidence in his defense. The trial judge charged the jurors in this case that the defendant had a presumption of innocence and that the burden of proof never shifts to the defendant. Trial transcript at 1969. Numerous cases hold that impermissible burden-shifting can result in reversal of a conviction. *See, e.g., Francis v. Franklin*, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

petitioner's remaining contentions, since the court has already determined that petitioner is entitled to relief and that the State is barred from retrying him. However, peittioner and respsondent are entitled to a decision on all the issues raised in the habeas petition, so that upon appeal each of petitioner's contentions can be finally decided. The public interest likewise favors a speedy, rather than a piecemeal, decision.

The court has carefully considered petitioner's remaining contentions, and finds them to be without merit. A lengthy discussion of each argument is not warranted by the record.

VIII. Conclusion

To summarize, this court finds that no rational trier of fact could have found the essential elements of the crimes beyond reasonable doubt, as required by *Jackson v. Virginia.* The evidence is insufficient because (1) a reasonable hypothesis to explain Ms. Hanks' death exists and that hypothesis raises a reasonable doubt as to petitioner's guilt, and because (2) the only testimony linking petitioner with Ms. Hanks' death (the testimony of Wrentz) cannot be taken as true by a rational jury. The state is thus barred from retrying the petitioner. Furthermore, the police misconduct in this case "shocks the conscience" and thus violated petitioner's rights under the Due Process Clause.

Therefore, even if the court were mistaken concerning the sufficiency of the evidence claim, petitioner is nevertheless due a new trial because of the police misconduct. Accordingly, petitioner's application for a writ of habeas corpus is hereby GRANTED.

Having determined petitioner's convictions to be invalid, it is hereby ORDERED that respondent is to release the petitioner from custody immediately after the judgment of this court becomes final, either by failure of the respondent to appeal this judgment or after affirmance on appeal.

E.K. WILCOX, JR.

v.

STATE

No. 39046

Supreme Court of Georgia.

March 18, 1983

Rehearing Denied March 30, 1983.

Defendant was convicted of murder and of unlawful concealment. After trial in the Superior Court, Lowndes county, Roy M. Lilly, J., defendant appealed. The Supreme Court, Bell, J., held that: (1) evidence could be found sufficient to exclude beyond reasonable doubt any other reasonable hypothesis accept guilt; (2) due process reasons for excluding use of defendant's involuntary statement do not apply with equal force to use of involuntary statements from nondefendant witnesses; (3) for marital privilege to apply, communications must be confidential, and confidential communications are those where one spouse derives knowledge from the other by virtue of the special confidence of their husband-wife relationship; (4) though police used some questionable interrogation techniques, such as trickery, intimidation and isolation, there was no basis upon which indictment should have been dismissed or directed verdict granted, in view of fact that injury alleged was not direct one to defendant such as where his own confession obtained by coercion is sought to be introduced and in view of finding that defense counsel fully used right of cross-examination and right to place before jury issue of credibility and veracity of testimony and statements; and (5) there was no prejudicial error in qualification of jurors.

Affirmed.

Gregory, J., filed specially concurring opinion in which

Clarke and Weltner, JJ., joined.

1. Homicide 250

Evidence was such that rational trier of fact could reasonably find defendant guilty of murder and of subsequent concealment of that murder beyond reasonable doubt and could reasonably have found that evidence excluded, beyond reasonable doubt, every other reasonable hypothesis except that of guilt. O.C.G.A. §24-4-6.

2. Criminal Law 1036.7

By raising no objection to use of witnesses' prior statement at trial, defendant waived right to raise objection on appeal, but Supreme Court would nevertheless consider his arguments.

3. Constitutional Law 266.1 (1)

Due process principle of excluding involuntary confessions rests not solely on potential unreliability of such statements but also on defendant's position in system of justice, and due process reasons for excluding use of defendant's involuntary statement do not apply with equal force to use of involuntary statements from nondefendant witnesses. U.S.C.A. Const. Amends. 5, 6, 14.

4. Witnesses 379 (1)

No common-law evidentiary reasons forbid use of nondefendant witnesses' prior statement for impeachment purposes.

5. Witnesses 192

For marital privilege to apply, communications must be confidential, and confidential communications are those where one spouse derives knowledge from the other by virtue of the special confidence of their husband-wife relationship. O.C.G.A. §24-9-21(1).

6. Witnesses 190

Impersonal communications concerning husband's daily activities were not within marital privilege.

7. Criminal Law 700

Though police used some questionable interrogation techniques, such as trickery, intimidation and isolation, there was no basis upon which indictment should have been dismissed or directed verdict granted, in view of fact that injury alleged was not direct one to defendant such as where his own confession obtained by coercion is sought to be introduced and in view of finding that defense counsel fully used right of cross-examination and right to place before jury issue of credibility and veracity of testimony and statements.

8. Criminal Law 1166.18

Jury 105 (2)

Where prospective juror twice averred that if selected she would arrive at decision based solely upon evidence adduced at trial and instructions, reviewing court could not conclude from record that her opinion concerning matter of law was so fixed that she would not follow instructions of trial court, and, if there was error in qualifying her, defendant did not use all of his allotted peremptory strikes and error, if any, was harmless.

9. Jury 83 (1)

Trial court did not abuse discretion in overruling challenge to jury venireman, objection to whom was based soley upon allegedly equivocal answer given during voir dire.

10. Criminal Law 1166.16

Where traverse jury venireman's name was not called before 12 venirepersons who tried case were selected, and where no alternate actually sat on jury, any error in qualifying such traverse jury venireman as prospective juror was harmless. O.C.G.A. §15-12-133.

11. Jury 131 (4)

Where prospective juror stated she did not know of any reason why she couldn't be fair and impartial juror but on questioning by defense counsel stated she had "leaning" but felt she could be fair juror, trial court did not abuse discretion in refusing to let defense counsel ask whether inclination or leaning was in favor of or against defendant. O.C.G.A. §15-12-164(a)(3), (c).

Wilby C. Coleman, Coleman & Kitchens, Valdosta, Bobby Lee Cook, Cook & Palmour, Summerville, for E.K. Wilcox, Jr.

H. Lamar Cole, Dist. Atty., Valdosta, Michael J. Bowers, Atty. Gen., Virginia H. Jefferies, Staff Asst. Atty.Gen., for the State.

BELL, Justice.

The appellant was tried in the Lowndes County Superior Court for the murder of Hellen Hanks and for the unlawful concealment of her death. On January 14, 1982, the jury found the appellant guilty of both offenses. He was sentenced to life imprisonment for murder and to a consecutive twelve month sentence for concealing the murder. He appeals.

On August 31, 1972, a Thursday, the victim, thirty-five year old Hellen Hanks disappeared. At that time, she was working as a bookkeeper and secretary for Wilcox Outdoor Advertising in Valdosta, a company owned by the appellant, E.K. Wilcox, Jr. and his father, E.K. Wilcox Sr. Her body was discovered approximately eight years later, on November 24, 1980, by a logger clearing a wooded area.

On August 31, 1972, Hellen went to work as usual. She was wearing a dark green dress with a long strand of green beads. After work, she planned to have her hairpiece combed and her typewriter repaired. Jerry Davis, an employee of Wilcox Outdoor Advertising, testified that he saw her in the office at about 8:15 a.m. before he left on an

assignment.

At about 5:00 p.m. that afternoon, James Hanks, the victim's husband, received a telephone call from the appellant. Hanks testified that the appellant told him that Hellen could not be found around the office, although her car was still there. Mr. Hanks then immediately drove to the Wilcox Outdoor Advertising office, arriving there at about 5:20 p.m. or 5:25 p.m. He testified that when he arrived, the appellant was going through Hellen's purse. He asked the appellant what he was doing, and he responded he was looking for some keys that Hellen would "not be needing . . . any longer."

At approximately 5:30 p.m. the Valdosta police and GBI agents, responding to the appellant's call, arrived at the Wilcox business. They unsuccessfully searched the office and warehouse for Hellen, but they did find her typewriter and hairpiece in the car and two completed applications for employment in her purse. Since they found no evidence indicating where Hellen might be, a missing person's report was filed.

The Valdosta police continued their investigation of Hellen's disappearance for several days before discontinuing it because neither Hellen nor any new evidence was found. Similarly, though the GBI investigation lasted longer, it was discontinued for lack of evidence.

On November 24, 1980, Fred Blanton, a logger, was digging up roots with a plow while clearing a wooded area off Indian Creek Road when he unearthed a wooden box. The plow ripped off the top of the box, which had been nailed shut, exposing a skeleton. Mr. Blanton called the police to the scene. In addition to the skeleton, the following items were found in or around the box: a metal cash box, a second metal box, a bank bag, receipt books, a padlock with a key inserted, several other keys, portions of a dress, a wedding ring, lingerie, shoes, a mass of hair and a length of rope. The dress, the padlock, and the other

keys were found under the burial box, and the lingerie was found rolled up in a ball next to it.

Because papers found referred to Wilcox Outdoor Advertising, an officer called the appellant to inquire if he was missing certain items. As a result of the call, but not at the request of the officer, the appellant came to the scene.

The burial box, the skeletal remains, and other items found at the scene were collected and examined. Dr. James Howard of the State Crime Laboratory examined the rope and testified that hairs, consistent with hairs taken from the mass of hair found in the box, were embedded in the surface of the rope, a condition, he testified, that would not exist as a result of casual contact. He testified that the combination of the condition of the hair and its adherence to the rope was consistent with it having been embedded in the rope while the victim was alive. He testified that the curl or loop in the rope was consistent with it having been crossed or tied and left that way for a long period of time. Although witnesses testified that the rope found in the grave was similar to rope used at Wilcox Outdoor Advertising, Dr. Howard testified that he had compared rope samples taken from the Wilcox business in 1980 to the rope found in the grave, and they did not match. He attributed the difference to the use of different rope fibers in 1972.

Several witnesses testified that the burial box was similar to boxes used by Wilcox Outdoor Advertising, and the appellant, while at the burial site, told several officers the box used to bury Mrs. Hanks looked like one that had been reported missing from the business in 1972. These boxes are approximately four feet long, two to three feet wide, and two to three feet deep and are made of wood, except for the top which is metal. In 1972, two trucks used at Wilcox Outdoor Advertising were fitted with these boxes to carry equipment. A third box of this type was

kept in the back of the warehouse. Willard King, the appellant's father-in-law, and now production manager of the Wilcox business, worked part time on Saturdays in 1972. He testified that he found this extra box was missing on the second Saturday, or nine days, after Hellen's disappearance. He had not worked the previous Saturday. He stated that he told the appellant the box was missing, and that the appellant said he would report it to the police, since Mrs. Hanks was also missing.

Other items found at the scene were also connected to the appellant's business. One of the keys fit a 1971 Ford pick-up truck, which was being driven by the appellant in 1972. There was testimony that there were two keys for this truck, one kept by the appellant, and one kept by Hellen Hanks while she was the secretary. In 1979, this truck was purchased from the appellant by Salem Scott, who testified the appellant gave him only one ignition key.

The cash box and the rusted padlock with the key in it were linked with the Wilcox business. To service its vehicles, the company had a gas pump located behind the building. The switch for this pump was located inside the office and was secured with a padlock. There was testimony that Hellen Hanks kept the key to this padlock in the cash box in her office. If employees wished to use the pump, they had to get the key from Hellen. The key found in the padlock opened it, and a key taken from the appellant's desk drawer one week after the burial site was uncovered also fit the rusted padlock.

Many of the personal belongings found at the burial site, such as the dress, the wedding ring, and the beads, were identified by Hellen's family as belonging to her. Both the dress and the bra showed signs of being torn or cut.

Medical studies and comparisons were conducted on the skull and other skeletal remains. Dr. Robert Johnson, a dentist, compared the skull to Hellen's dental records,

and established the skull to be Hellen's. Dr. Larry Howard of the Georgia State Crime Lab conducted two examinations of the skeletal remains, one shortly after the bones were found, and another in August of 1981.

Dr. Howard concluded the first examination of the skeletal remains about March 10, 1981. He testified that he was not able to establish the cause of death, but that, nevertheless, he was of the opinion that she was strangled. He based this opinion on his knowledge of the conditions of the burial site and on other items found at the burial site, particularly the rope, which was found tangled in hair and lying in the chest or neck area of the skeleton, and which, he testified, had had the approximate diameter of a neck when allowed to assume its own shape.

After statements taken from two employees of Wilcox Outdoor Advertising in July of 1981 indicated that the body may have been dismembered before burial, the remains were exhumed, and a second examination was performed. It revealed evidence of dismemberment of the left knee joint. Dr. Howard testified that after cleaning the knee joints, he found two linear or vertical, as opposed to horizontal, abrasions on the back of the left knee cap. He testified the abrasions were made by a pointed instrument, and that brown bodily fluid stains on the knee cap and the lack of abrasions in the dirt covering the knee cap indicated that the dismemberment occurred prior to the first burial. He also found a possible association lesion or slice mark on the bottom of the large thigh bone (the femur) of the left leg, located on the same side of the leg as the abrasions on the knee cap.

The left knee cap and the femur were also examined by Dr. Ellis Kerley, a leading forensic pathologist from the University of Maryland. He agreed that there were two incised marks on the back of the left knee cap and on the femur. Though he could not be positive of dismemberment in this case, he found these cut marks to be consistent with

dismemberment shortly after death.

Contrary testimony was offered by Dr. Joseph Burton. He testified that the bone exposed by the cut marks on the knee cap and femur was not mineralized or oxidized, as was other unmarked bone, indicating that these marks were a recent injury to these bones. He did not think that these marks were consistent with dismemberment of the leg.

After the discovery of the remains of Hellen Hanks, an investigation of her murder began. The police interrogated two employees of Wilcox Outdoor Advertising, Lorenzo Marshall and Ed Wrentz, who gave statements incriminating the appellant.

Lorenzo Marshall, who started work for the Wilcox business in 1952, gave a signed written statement on July 2, 1981, which was witnessed by Ed Wrentz. He stated that he did not remember the date, but that shortly after Mrs. Hanks disappeared, Ed Wrentz came to him and asked him to help him dig a hole. He stated that the appellant then drove them in his truck somewhere, where they dug until they had to stop because of rain, at which time the hole was about waist deep. He stated that he did not remember when but that he and Ed Wrentz later met the appellant and his father at Wilcox Outdoor Advertising, at which time the appellant had them load a box on his truck and drove them to the hole, where he and Ed finished digging and buried the box. He also stated that Ed threw something that looked like a dress into the hole before the box was lowered.

At trial, Marshall recanted his story, maintaining that he was in Albany, Ga. from Tuesday until Friday, September 1, 1972, and that he had nothing to do with a burial. Two other witnesses, both employees of Wilcox Outdoor Advertising, testified to this effect. Both testified that they were in Albany working with Marshall during the week of Hellen's disappearance, and that they did not

arrive in Valdosta until that Friday afternoon. Marshall testified that he told the officers from the very beginning he didn't know anything about a burial. He testified that the officers put words in his mouth by telling him what Ed had said. He testified that since he was scared and wanted to go home, he went along with the story.

Ed Wrentz, who was seventy-eight at the time of trial and who had worked for the Wilcox business for more than thirty years, gave a signed statement on July 1, 1981 incriminating the appellant. Unlike Marshall, he recounted basically the same story on direct examination at trial. He testified that shortly after Mrs. Hank disappeared, he and Lorenzo Marshall were driven into the country by the appellant to dig a hole, but that they did not finish because of rain. He testified that he didn't remember the date, but that it was dark, though it hadn't been dark long. He testified that at a later date, he and Lorenzo met the appellant and his father at the warehouse, at which time he and Lorenzo put Mrs. Hank's body into a box and loaded it onto a truck. He testified that the body was stiff and that extra pieces, which he thought were part of her legs, were also put in the box. He testified they they then drove to the hole, at which time he and Lorenzo finished digging the hole and placed the box, along with a few other things, into it.

After testifying to the above story on direct, Wrentz repudiated it on cross. He stated that the first time he talked to the police, he told them he didn't know anything about Mrs. Hanks's disappearance. He testified he told the truth on that occasion and that that was the truth now, i.e., at the time of trial. He testified on cross that he was out of town Thursday, August 31, 1972 and Friday, September 1, 1972, but arrived back in Valdosta that Saturday. This testimony contradicted the statement he gave to police, which was that he and Lorenzo helped dig a hole the night of Hellen's disappearance. Mr. Wrentz, however, did testify on cross that he did get a box from the

warehouse and that he did dig a hole.

On redirect, Mr. Wrentz reiterated that he and Lorenzo put Mrs. Hank's body in a medium sized box, were driven somewhere in a Ford pick up truck, dug a hole, and buried the box. Also, his description of the burial site before its clearance by Fred Blanton was consistent with that of other witnesses. He described a gravel road, off of which was a three-path-road surrounded by woods, which ran past the burial site.

Concerning his activities on August 31, 1972, the appellant gave a statement to the police in October of 1972 and testified at trial. It is undisputed that the appellant and his father left Atlanta on the morning of August 31, 1972 to return to Valdosta. They had been there since Tuesday, August 29, 1972 on a business trip. The crucial issues concern his time of arrival in Valdosta and his activities once there.

In October of 1972, the appellant talked with GBI agent Larry Oxford. He stated that while driving back to Valdosta on August 31, 1972, he and his father stopped around 1:00 p.m. to visit a couple of friends, Willard King and Howard Holt, in Cordele. He stated that they left Cordele and arrived at his father's home in Valdosta around 3:45 p.m. From there, they drove separate cars to the office and arrived there around 4:00 p.m. He stated that Hellen was not there when they arrived, although her car and purse were, and since he and his father could not find her, they called Mr. Hanks and the police around 5:00 p.m.

At trial, the appellant recounted basically the same story. He testified that on their return from Atlanta, he and his father stopped in Cordele about 1:00 p.m. to visit his father-in-law, Willard King, stayed there approximately an hour, and then left for Valdosta. They got off a I-75 at their Valdosta exit around 4:00 p.m., give or take a few minutes. From there, he testified they went to

the family home so he could pick up his car. They drove separate cars to the office, arriving between 4:15 p.m. to 4:30 p.m. He testified that Hellen was not there when they arrived and that they looked for but were unable to locate her. As a result, he testified, he called Mr. Hanks about 4:45 p.m. to inquire about Hellen and called the police shortly thereafter. He testified that he did not notice if Hellen's purse was at the office, and he denied looking through it, though he did state that either he or his father asked Mr. Hanks to look in her purse to see if her office keys were in it. He testified that Mr. Hanks found them and handed them to him. He denied making the statement that she wouldn't be needing the keys anymore. The appellant's father testified to basically the same facts concerning the time of their arrival and the circumstances following it.

The appellant claimed that at the time of the initial search for Hellen by Mr. Hanks and the police, the entire office was available to be searched. Both the appellant and his father testified that Wilcox, Sr. was at the office during the search. The appellant testified that the search lasted until around 8:00 p.m., at which time he left the office, went home and washed up, and drove to a dinner honoring him and his wife, arriving there between 8:30 p.m. and 9:00 p.m. After the dinner, he testified that he first went back to the office to make sure the doors had been locked and then went home.

However, there was testimony contradicting some of the above assertions. First, Mr. Hanks and two police officers testified that the appellant's father was not at the office while they were there. Second, two police officers testified that the search ended about 6:30 p.m. In addition, there was testimony that only Mrs. Hanks's car, the appellant's car, a police car, and a truck were at the office on the afternoon of August 31, 1972, indicating that the appellant's father, who drove there in his own car, was not at the office.

The appellant's ex-wife and her father, Willard King, contradicted the appellant's and his father's testimony concerning their time of arrival in Valdosta on August 31, 1972. The appellant's ex-wife testified that the appellant called her shortly after five o'clock on August 31, 1972. She testified that he told her that he and his father had arrived at the office between 3:00 p.m. and 3:30 p.m., and had found the door open, but couldn't find Mrs. Hanks. Willard King testified that on August 31, 1972, the appellant and his father stopped in Cordele to visit him at approximately 1:00 p.m. and left at about 1:30 p.m. The appellant's ex-wife testified that she and her husband had previously driven from Valdosta to Cordele several times in around 60 to 70 minutes (the speed limit at that time was seventy miles per hour). Mr. King testified the drive should take about one and one-half hours.

On the evening of August 31, 1972, a party honoring the appellant and his ex-wife was scheduled. The appellant's ex-wife testified that when she talked to the appellant shortly after 5:00 p.m., he told her to go to the party without him, because he wasn't sure what time Mr. Hanks and the police would leave the office. Both the appellant's ex-wife and her mother testified that the appellant and his father did not arrive at the party until 9:00 p.m. There was testimony that the police left the Wilcox business premises at about 6:30 p.m. The appellant's ex-wife also testified that after the party ended at 10:30 p.m., the appellant, instead of going home with her, told her that he needed to go back to the office to make sure everything was locked. She testified that though he was in bed the next morning when she awoke, he had not come home before she went to sleep around 11:00 p.m. and did not wake her when he did come home. The appellant testified that he arrived home about thirty to forty minutes after leaving the party.

Several witnesses testified to strained relations between the appellant and Hellen Hanks. Dorothy Edwards, Hellen's best friend, testified that the Sunday before Hellen

disappeared Hellen told her she was afraid of the appellant and was looking for other employment. Dorothy testified that Hellen told her that she slapped the appellant one day because he grabbed her on the buttocks.

Another friend, Cara Ardrengo, testified that the Tuesday before Hellen disappeared Hellen spoke with her and expressed fear of the appellant and a desire to get away from him by finding other employment. She testified that Hellen told her that she was keeping two sets of books, one that was good, and one that wasn't good, and that she didn't like to be in that position.

Jerry Davis, an employee of Wilcox Outdoor Advertising at the time of Hellen's disappearance, testified that he saw the appellant and Hellen appear disturbed when they bumped into each other in a doorway, and another employee, John Goodman, testified that he saw the appellant place his hands on Hellen, who then pushed them away. He also said he heard the appellant call Hellen a "dumb bitch."

Lucy Hanks, Hellen's daughter, also testified that Hellen wanted a new job because she did not like the appellant. Lucy testified that one day, several weeks before her mother's disappearance, her mother came home crying because she had slapped the appellant for making a pass at her.

The appellant denied that he had ever touched or patted Hellen and that she had never slapped him. He testified that though he had been irritated with her on one occasion, she was a goody employee with whom he never had any difficulty.

[1] 1). In his third enumeration of error, the appellant contends that the evidence against him was entirely circumstantial and did not exclude every other reasonable hypothesis except that of his guilt, see OCGA § 24-4-6 (Code Ann. § 38-109), and that the evidence was insufficient to support a conviction under the standards of

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We disagree. After reviewing the evidence in a light most favorable to the jury's verdict, we conclude that a rational trier of fact could reasonably have found the appellant guilty of the murder of Hellen Hanks and the subsequent concealment of that murder beyond a reasonable doubt, *Jackson v. Virginia*, supra, and could reasonably have found that the evidence excluded, beyond a reasonable doubt, every other reasonable hypothesis except that of the appellant's guilt. OCGA § 24-4-6 (Code Ann. § 38-109).

2)In his fourth enumeration of error, the appellant contends that the state was improperly allowed to impeach the credibility of Lorenzo Marshall by use of his prior allegedly coerced and involuntary statement.

The appellant asserts that there are both constitutional and common law evidentiary reasons for forbidding the use of involuntary statements to impeach a nondefendant witness.

[2] Though the appellant raised no objection to the use of Marshall's prior statement at trial, thereby waiving his right to raise the objection on appeal, we will nonetheless consider his arguments. *Corn v. Hopper*, 244 Ga. 28(6), 257 S.E.2d 533 (1979); *Sheffield v. State*, 235 Ga. 507(2), 220 S.E.2d 265 (1975); *Hance v. State*, 245 Ga. 856(5), 268 S.E.2d 339 (1980).

[3] First, the appellant argues that he had his own due process right to prevent the prosecution from impeaching the credibility of a nondefendant witness by means of a prior involuntary statement because the reasons for excluding the use of a defendant's involuntary statement apply with equal force to statements of nondefendant witnesses. See, *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

We disagree that the due process reasons for excluding the use of a defendant's involuntary statement apply with equal force to the use of involuntary statements from nondefendant witnesses. The due process principle of excluding involuntary confessions rests, as we perceive it, not solely on the potential unreliability of such statements but also on the defendant's position in our system of justice. This principle has been enunciated by the United States Supreme Court. *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1960). In that case, the court stated that "To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration . . .Since a defendant has been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find the procedures leading his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." *Rogers v. Richmond*, supra, p. 541, 81 S.Ct. at 740. The state may not prove the guilt of an accused by coerced statement from his own mouth. *Rogers v. Richmond*, p. 541, 81 S.Ct. at 740.

The distinction between using coerced statements of nondefendant witnesses as opposed to those of a defendant was also made in *United States ex rel Portelli v. Lavallee*, 469 F.2d 1239 (2nd Cir.1972), cert. denied, 411 U.S. 950, 93 S.Ct. 1939, 36 L.Ed.2d 412 (1973). In that case, the Second Circuit considered whether the due process rights of the defendant had been violated by the use of a damaging witness's statement and testimony at trial, when the witness's statement had been coerced. The court approved the use of the witness's statement and testimony and found no violation of the defendant's due process rights. It did so on the basis that the defendant had had a full opportunity to inquire into the circumstances surrounding the making of the statement, thereby giving the jury the op-

portunity to pass upon the credibility and veracity of the witness's statement and testimony. It found this situation distinguishable from cases involving a defendant's coerced confession. We agree with the general principle of this case.[1]

In the instant case, because Marshall was on the witness stand and available to be questioned concerning his statement to the police and because one of the due process principles for excluding involuntary confessions (the defendant's position in our system of justice) does not apply to nondefendant witnesses who take the stand at trial, we find that no due process rights of the appellant were violated.

[4] For the same reasons as enunciated above, we find that there are no common law evidentiary reasons for forbidding the use of Marshall's prior statement for impeachment purposes.

[5, 6] 3) In his fifth enumeration of error, the appellant contends that the trial court erred in allowing the appellant's exwife to testify to communications made to her by him during the time they were married.

We disagree. OCGA §24-9-21(1) (Code Ann. §38-418) provides that communications between a husband and wife are inadmissible on grounds of public policy. However, for this exclusion to apply, the communications must be confidential, *Georgia International Life Insurance Co. v. Boney*, 139 Ga. App. 575(2), 228 S.E.2d 731 (1976); *Lowry v. Lowry*, 170 Ga. 349(6), 153 S.E. 11 (1930). Confidential communications are those where one spouse derives knowledge from the other by virtue of the special confidence of the husband-wife relationship. *Georgia*

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[1] We note, however, that the circumstances surrounding the witness's statement in that case were quite egregious and that under the proper facts, which are not presented here, public policy reasons might forbid the use of such statements in certain situations.

International Life Insurance Co. v. Boney, supra, 139 Ga.App. pp. 578-579, 228 S.E.2d 731. Every spoken word between a husband and wife is not confidential; if the communication is an impersonal one not made in reliance on the marital relationship, the communication is not confidential, and no policy reason bars its admissibility, *Georgia International Life Insurance Co. v. Boney,* supra, p. 579, 228 S.E.2d 731.

In the instant case, we find the communications testified to by the appellant's ex-wife were not confidential. She testified only to such matters as the time the appellant called her from the office the afternoon of August 31, 1972, the time he told her that he and his father arrived there, and the fact that the appellant told her, after the party in their honor, he was going to return to the office to make sure it had been locked. These communications were clearly not made to the appellant's ex-wife by virtue of trust he placed in her as his wife. They were impersonal communications concerning his daily activities. Consequently, the trial court did not err in allowing her to testify.

[7] 4) In the appellant's final enumeration of error, he contends that the trial court erred in not granting a directed verdict of not guilty on the ground that the investigation of the appellant involved police misconduct so fundamentally unfair and shocking that it violated due process.

The appellant objects to what he alleges were intimidating interrogation techniques of several witnesses, particularly Lorenzo Marshall, Ed Wrentz and John Goodman.

Excerpts from the tape recordings of these interrogations were read into the record by the defense counsel while cross-examining the above witnesses. These excerpts reveal that the police used some questionable interrogation techniques, such as trickery, intimidation, and isolation,

though it is difficult to judge the extent of their use from the limited excerpts available. For instance, the excerpts show the interrogating officers told these witnesses, among other things, that their fingerprints had been found at the grave site, that they could be tried for murder on the basis of what the police knew, and that they might got to jail for a long time. Also, Lorenzo Marshall was interrogated from 8:00 a.m. until 6:00 p.m. without being allowed to eat.

While we do not condone such activity, we perceive no basis upon which an indictment should have been dismissed or a directed verdict granted.

This Court and the United States Supreme Court have held that when considering the appropriate remedy for an alleged constitutional violation involving governmental misconduct, the remedy should be tailored to the injury suffered from the violation alleged and should not result in the dismissal of an indictment, or as is also sought here, in the granting of a directed verdict, when the case may proceed with full recognition of the defendant's right to a fair trial. *Jordan v. State*, 247 Ga. 328(1), 276 S.E.2d 224 (1981); *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

In this case, the constitutional violation alleged is questionable police interrogation techniques, and the injury suffered is the possible inducement of potentially unreliable coerced or involuntary statements from witnesses subjected to these techniques. We note that the injury alleged here is not a direct one to the appellant such as where his own confession obtained by coercion is sought to be introduced. See, *United States ex rel. Portelli v. Lavallee*, supra.

We find that the appropriate remedy for the violation alleged in this case, the use of questionable interrogation techniques upon witnesses, is that stated in *United States ex rel. Portelli v. Lavallee*, supra, which is the defendant's right to fully cross-examine any witnesses called

at trial concerning their interrogations. This remedy fits the violation alleged and assures the defendant of a fair trial by giving him as opportunity to fully place before the jury the issue of the credibility and veracity of the witnesses' testimony and statements, a remedy which the transcript shows defense counsel fully used in the instant case. *Jordan v. State*, supra; *United States v. Morrison*, supra. Consequently, we find that the trial court acted properly in not dismissing the indictment and in not granting a directed verdict, two drastic remedies which would have brought the criminal proceeding to a halt.

Here, it is anomalous for the appellant to urge the questionable police interrogation techniques used against witnesses called in his trial should have brought a halt to the criminal proceedings, when the remedy for his own coerced or involuntary confession, if there had been one, would have been merely the suppression of that statement. As indicated above, we decline to so hold.

[8] 5) Wilcox's second enumeration of error concerns the voir dire questioning of Sandra Finland. The district attorney asked Mrs. Finland if she had "formed any opinion as to the guilt or innocence of the accused." She responded, "It's hard to answer." At that point the trial judge asked her whether if she were selected as a juror she would disregard any opinion she might have formed and instead would decide the case on evidence presented during trial under the law given her as charged by the court. She answered affirmatively. The district attorney then questioned Mrs. Finland whether she knew of any reason why she could not be a fair and impartial juror. She said she didn't.

Defense counsel subsequently asked, "Have you formed any opinion at all about this case?" A. "Yes, sir." Q. " . . . I take it that you lean to one side or to the other?" A. "Yes, sir." . . . Q. "What is your opinion at this time?" A. "Guilty." Q. " . . . would it be fair to say that it would

take some evidence–that some evidence would have to be introduced in order to erase that opinion from your mind?" A. "Yes, sir." At this point the court again intervened, and substantially repeated his earlier question, asking her whether despite the fact that she had an opinion with respect to the guilt or innocence of the accused, she could yield that opinion and arrive at a decision based solely upon evidence and instructions, and again she answered affirmatively.

Defense counsel then repeated his question concerning her misunderstanding that appellant had the burden to produce evidence to overcome her opinion that he was guilty, and again she responded in the affirmative. Appellant challenged her for cause, and the court overruled the challenge. At the end of voir dire appellant exercised his second peremptory strike against Mrs. Finland. However, he did not exhaust his available strikes, using only nineteen out of twenty before twelve jurors were accepted. On appeal he contends the failure to grant his challenge first, was an abuse of discretion, since the juror's mind was not perfectly impartial between the state and the accused and thus rendered her incompetent to serve, OCGA §15-12-164(a)(3), (c) (Code Ann. §§ 59-806, 59-807), and, second, impermissibly shifted the burden of proof to appellant.

This enumeration is without merit. Mrs. Finland twice averred (the second time after defense counsel had already elicited her opinion concerning the burden of the proof) that if selected she would arrive at a decision based solely upon the evidence adduced at trial and the instructions on the law given her by the court. We cannot conclude from the record that her opinion concerning a matter of law was so fixed that she would not follow the instructions of the trial court. The judge did not abuse his discretion in refusing to dismiss her for favor. *Woods v. State*, 240 Ga. 265(4), 239 S.E.2d 786 (1977); *Welch v. State*, 237 Ga. 665(5), 229 S.E.2d 390 (1976) (juror at one

point stated he thought defendants should have to prove their innocence, but judge ruled legal burden requirements would be given to the jurors in the charge); see *Tennon v. State*, 235 Ga. 594(2), 220 S.E.2d 914 (1975). Moreover, even assuming the court erred in qualifying Mrs. Finland, appellant didn't use all his allotted preemptory strikes and the error, if any, was harmless. *Strickland v. State*, 247 Ga. 219(15), 275 S.E.2d 29 (1981); *Gee v. State*, 239 Ga. 583(1), 238 S.E.2d 356 (1977); *Welch v. State*, supra.

6) In his first enumeration of error, appellant complains of the failure of the trial court to dismiss for cause three traverse jury venirepersons, Nutt, Parrish, and Swank. Each was questioned and challenged, and nevertheless qualified by the court. Upon the close of voir dire appellant exercised his fifteenth and sixteenth peremptory strikes to remove Nutt and Parrish, respectively. However, as we noted in Division (5), supra, he used only nineteen of his twenty allotted strikes before twelve jurors were impaneled. Two alternate jurors were then to be selected. Wilcox was allotted four peremptory strikes to use in choosing the alternates. He used his first strike against Swank. Neither alternate ever sat as a juror.

On appeal Wilcox claims that OCGA §15-12-133 (Code Ann. §59-705) gave him an absolute right to uncover "any opinion as to which party ought to prevail," and that the trial court not only abridged his statutory right but also unconstitutionally denied him trial by an impartial jury and effective assistance of counsel. We disagree.

[9, 10] First, we note that the constitutional ground was not raised at trial, but in any event has no merit since, as we decide below, there was no harmful abridgment of defendant's § 15-12-133 (Code Ann. § 59-705) right. Second, appellant's objection to Mr. Nutt was based solely upon an allegedly equivocal answer she gave during voir dire; he has not argued that ground before us, and he may not raise any other ground for challenge on appeal. The

trial court did not abuse his discretion in overruling the challenge to Nutt. Thrid, Swank's name was not called before the twelve venirepersons who tried the case were selected, and no alternate actually sat on the jury; therefore, any error in qualifying her as a prospective juror was harmless. Thus the only challenge we have left to consider is the challenge to Parrish.

[11] During examination of Mrs. Parrish the trial court queried her whether she knew of any reason why she couldn't be a fair and impartial juror, and she answered she didn't. Later, defense counsel asked her if she had "a leaning or inclination towards one side of the case or the other?" A "Uh-hunh." (sic). The court intervened, and as before asked whether she could disregard her opinion and decide the case solely on trial evidence and instructions. She said she could and would.

Defense counsel persisted, and asked if she still had the "leaning." She answered yes, "but I do feel like I could be a fair juror." The court again intervened and questioned her, and again she affirmed that she would disregard her leaning and limit herself to consideration of evidence and instructions presented at trial.

Appellant's lawyer then said, "Let me ask if your inclination or your leaning is in favor of or against–" The Court: "I'm not going to let you ask that." Appellant later challenged for cause, claiming Parrish was "leaning in one direction," and complaining that he should have been allowed to discover in which direction she leaned.

We find no abuse of discretion by the trial court.

"Since the distinction between questions which ask jurors how they would decide issues of a case if and when such issues are presented and questions which merely inquire whether jurors can start the case without bias or prior inclination is not always crystal clear, the 'control of the voir dire examination is vested in the sound legal discretion of the trial judge and will not be interfered with by

this court unless the record clearly shows an abuse of that discretion.' " *Waters v. State*, 248 Ga. 355(3), 283 S.E.2d 238 (1981). *Welch v. State*, supra. "Furthermore, there is no evidence that [appellant] utilized all of [his] peremptory strikes. Therefore [he was] not harmed even if the trial judge erred in not striking the juror for cause." *Welch, id.*, p. 671, 229 S.E.2d 396.

For the reasons stated above, we affirm.

Judgment affirmed.

All the Justices concur, except GREGORY, J., who concurs specially.

GREGORY, Justice, concurring specially.

I agree with the result reached by the majority in this case. With regard to division Five of the opinion, I agree that trial court did not abuse its discretion in refusing to dismiss juror Finland for favor. However, for reasons which I stated in *Blankenship v. State*, 247 Ga. 590, 597, 277 S.E.2d 505 (1981), I am not persuaded that any error in qualifying Finland was harmless on the ground that appellant failed to exhaust his peremptory strikes.

I am authorized to state that CLARKE and WELTNER, JJ., join in this special concurrence.